Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1976

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS OF THE CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellants take this appeal from an Order of the Supreme Court of the State of California denying appellants a writ of review of Orders of the California Public Utilities Commission setting a mandatory division of revenues between certain types of dump truck operators in California. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial constitutional questions are raised.

ORDERS APPEALED

The Order of the Supreme Court of the State of California denying a Writ of Review without opinion is attached as Appendix A. Its Order Denying Rehearing is attached as Appendix B. Both are unreported.

The California Supreme Court's action related to three similar decisions of the Public Utilities Commission of the State of California, each of which is unreported. The lead decision of the three is Decision No. 85918 which contains opinions, findings of fact and conclusions of law underlying all three decisions. It is attached as Appendix C. The other two (Decision Nos. 85919 and 85920) are attached as Appendices D and E, respectively. The Notice of Appeal is attached as Appendix F.

JURISDICTION

This appeal is brought pursuant to Section 1257, subparagraph (2) of Title 28 to the United States Code. The judgment of the California Supreme Court denying a writ of review was issued on January 5, and an order denying rehearing was filed on February 7, 1977. This judgment is a final judgment on the merits of the case rendered by the highest court of the State of California even though issued without opinion. *Napa Valley Elec. Co. v. Railroad Commission,* 251 US 366, 64 L.Ed. 310, 40 S.Ct. 174 (1920); *People v. Western Airlines, Inc.,* 42 Cal.2d 621, 268 P.2d 723, appeal dismissed 348 US 859, 99 L.Ed. 677, 75 S.Ct. 87 (1954).

The Orders of the Public Utilities Commission were challenged before the California Supreme Court on the grounds, inter alia, that they denied applicant due process

of law and equal protection contrary to the Fourteenth Amendment to the United States Constitution.

The decisions of the Public Utilities Commission in question are legislative in nature, being issued in connection with the Commission's setting of minimum rates for dump truck carriers. They are therefore statutes of a state within the meaning of 28 USC §1257(2), and this Court has jurisdiction to determine their constitutionality on appeal. *La Crosse Tel. Corp. v. Wisconsin Board,* **336 US 18, 93 L.Ed. 463, 69 S.Ct. 379 (1949);** *Hamilton v. University of California,* **293 US 245, 79 L.Ed. 343, 55 S.Ct. 197 (1934);** *American Toll Bridge Co. v. Railroad Commission,* **12 Cal.2d 184, 83 P.2d 1 (1938).**

QUESTIONS PRESENTED

1. Do the Commission's three decisions setting a mandatory division of revenues between overlying carriers and underlying carriers violate Appellants' rights to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution when said decisions are based on findings which are entirely unsupported by any evidence in the record and on factual assumptions which Appellants have had no opportunity to test by cross-examination and rebuttal?

2. Do these state administrative decisions which provide no division of revenue regulation if the dump truck hauling is for public projects and a mandatory "not less than 80%" division if the dump truck hauling is for private projects, establish an arbitrary and unconstitutional discriminiation in violation of the Equal Protection Clause

of the Fourteenth Amendment when the avowed purpose of the regulations is to provide adequate compensation for dump truck carriers?

REGULATIONS INVOLVED

The three decisions of the California Public Utilities Commission apply, respectively, to the three minimum rate tariffs applicable to dump truck carrier hauling in California. Thus, the Order in the Commission's Decision No. 85918 adds the following language to Item 210 of the Commission's Minimum Rate Tariff 7-A:

> "NOTE 3—In the event the underlying carrier furnishes tractor and driver without trailing equipment, and the overlying carrier furnishes the trailing equipment the charges paid to the underlying carrier shall be not less than 80% of the charge determined in accordance with the provisions of this tariff. The provisions of this note will not apply to shipments of rock, sand, gravel or earth transported to, from or on a Public Works Construction Project."

The orders in the other two decisions under attack (Decision Nos. 85919 and 85920) each prescribe a tariff rule identical with the first sentence quoted above.

STATEMENT OF THE CASE

Dump truck carriers engaged in California intrastate commerce are regulated by the California Public Utilities Commission (PUC) pursuant to California Public Utilities Code §§3610-3615. Each dump truck carrier engaged in transportation is required to hold a permit

issued by the PUC authorizing that transportation. California Public Utilities Code §3611.

As part of the PUC's scheme of regulation, minimum rates have been established for dump truck carriers pursuant to California Public Utilities Code §3662. The rates applicable to dump truck carriers are contained in three separate Minimum Rate Tariffs (MRTs): MRT 7-A (which applies statewide), MRT 17-A (which applies to Southern California only) and MRT-20 (which applies to Northern California only).

Dump truck operation generally requires two pieces of equipment: a tractor to do the pulling and a trailer in which to put the material such as rock, sand, gravel and earth.

A carrier owning both these types of equipment and offering his services to shippers, is called a full-unit operator.

A carrier offering his services to shippers but owning none or only part of the necessary equipment may engage other carriers, called underlying carriers or subhaulers, to provide whatever equipment the overlying carrier lacks.

Some overlying carriers own only trailers. They engage subhaulers who furnish the tractors and drivers, and in performing the physical operation the subhauler rents the trailing equipment from the overlying carrier.

The three regulations being appealed set, in effect, a maximum trailer rental fee which overlying carriers may charge for trailer equipment to tractor-only subhaulers. The maximum rent is expressed in terms of a division of the minimum rate applicable to the transportation performed, no more than 20% of the minimum rate going to

the overlying carrier to compensate him for providing the trailer and the other services he provides. By some quirk, unexplained, dump truck hauling under one of the three tariffs aforementioned is exempted from the 80%-20% division if the hauling is for a public as opposed to a private construction project. Appellants submit, not only was this an arbitrary distinction, but that the record was devoid of any support to justify an 80%-20% division for any of the dump truck hauling in question, regardless of whether it be for public or private construction.

Minimum rates, despite their name, are *the* rates because competition generally makes it economically impossible to charge more. The trailer rental provisions, therefore, in practice create an 80%-20% division, between overlying carriers and tractor-only subhaulers, of the minimum rate.

Appellants stated to the PUC that no division of the minimum rates between overlying carriers and tractor-only subhaulers could be equitable to both because the minimum rates had been set on the basis of cost data relating to full-unit operators, which did not reflect the full costs of providing transportation by means of a combination of an overlying carrier and a tractor-only subhauler.

After hearings in the case, the PUC Examiner issued a proposed report in which he agreed that no division of revenues, derived from application of the aforesaid rates, between overlying carriers and tractor-only subhaulers could be equitable with respect to transportation

provided in connection with construction projects. Recommended Finding 31; Appendix C.

When the case was considered by the full Commission, the Commission agreed that the cost data underlying the existing minimum rates were for full-unit operation and that no data relevant to transportation performed by the combination of overlying carriers and tractor-only subhaulers had been offered in evidence in support of the proposed division of revenues:

> "The staff . . . overlooks the fact that any full-unit carrier (one who hires no subhaulers) would be required to perform [certain services] because those services are required in connection with dump truck transportation services on *construction projects* irrespective of whether a carrier with its own equipment is employed or an overlying carrier is employed. Not to include those services in the basic cost data for a full-unit operator results in the failure of the staff cost studies to recognize the true nature of the dump truck services required and performed on a construction project. *The only remedy for such failure is to prepare new cost studies which include [those services] in operating costs.*" Decision No. 85918. (Emphasis supplied). Appendix C, pp. 9, 10.

Having conceded the inadequacy of the evidence produced at the hearing in support of the proposed regulations, the Commission had only one proper course open to it: to refuse to set any division of revenues between overlying carriers and subhaulers. The Commission did not do this. Instead, with hardly a pretense of proceeding on the basis of evidence in the record, it adopted the Examiner's proposed 80%-20% division and applied

it to transportation on construction projects, with the exception of public construction projects falling under one of the three tariffs. Compare Proposed Report, Recommended Finding 31 with Decision No. 85918, Finding 31. Such Proposed Report is contained in Appendix C.

The way in which the Commission dealt with Recommended Finding 31, illustrates most clearly how the Commission liberated itself from the constraints of procedural due process. The Commission's staff, which supported an 80%-20% division, was opposed to the Examiner's recommendation that no trailer rental regulation should apply to construction work on non-public works construction (covered by MRT 7-A) and suggested that the exemption be narrowed to public works construction, although no evidence in the record suggested any distinction between public and non-public works construction. The staff cited no evidence in support of its suggestion. Commission Staff Exceptions to the Proposed Report of Examiner J. W. Mallory, filed with the PUC on January 16, 1976. The Commission, also without reference to the record, adopted the staff recommendation and proceeded mechanically to modify the Examiner's findings by inserting the words "public works" wherever the term "construction project" appeared. Decision No. 85918, Findings 25, 28-35.[1]

[1]The only reason given by the Commission for adopting the staff's proposal is a startlingly arbitrary and illogical statement:

> "The staff, in its exceptions, correctly points out that all dump truck transportation covered by MRT 7-A does not involve work performed on construction projects and proposes that the broad findings regarding MRT 7-A be limited to the construction projects defined in item 260 of MRT 7-A. For the balance of transportation services covered by MRT 7-A a division of revenues between overlying and underlying carriers [subhaulers] for trailer rental would be established as for MRT's 17-A and 20. Those exceptions of the staff are well-taken and will be adopted." Decision No. 85918. Appendix C, p. 10.

Item 260 of MRT 7-A provides that special rates shall apply to dump truck transportation on Saturdays, Sundays and certain designated holidays. A note to this item states, however, that the special rate that normally applies to transportation provided on California's Admission Day shall not apply to the transportation of earth to or from a public works construction project [as defined]. This is the only earlier instance of a distinction being drawn between public and non-public works construction.

[2]Even the California Dump Truck Owners Association, which represents subhaulers and which was one of the proponents of regulations setting a division of revenues, has virtually conceded that an 80%-20% division is not equitable. In a recent pleading filed with the PUC, the Association states: "While we do not necessarily agree that an 80-20 division of the minimum rate is an equitable one, we do believe that trailer rental regulation is needed and that further delay of the effective date while the overlying carriers seek relief from the above decisions is improper." Reply to Petition for Further Suspension Order, February 7, 1977 (no page numbers).

Appellants are baffled as to how the Commission can justify its limitation of the exemption to public works construction projects. Nothing in the record suggests any ground for distinguishing between public and nonpublic works construction projects. Furthermore, the Commission has never explained why a division of revenue expressly found to be inequitable in connection with MRT 7-A transportation on public works construction projects should be equitable when applied to other types of construction work.[2]

THE QUESTIONS ARE SUBSTANTIAL

1. THE COMMISSION DENIED PROCEDURAL DUE PROCESS TO APPELLANTS BY BASING ITS DECISIONS ON MATTERS NOT IN EVIDENCE.

The essence of procedural due process is that the parties to an administrative hearing are entitled to notice as to the issues to be raised at the hearing and are entitled to a decision based solely on the evidence presented at the hearing and not on extraneous matters. This general principle is illustrated, in the context of rate-setting hearings, by *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 US 292, 81 L.Ed. 1093, 57 S.Ct. 724 (1937). In that case the Court found that the Public Utilities Commission had violated appellant's procedural due process rights under the Fourteenth Amendment by basing its decision on information not in the record of the hearing. To decide a case against appellant on the basis of evidence that appellant did not know about and had no opportunity to rebut was not only unfair; it was, said the Court, condemnation without trial. 301 US 292, at 300. "Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal." *Market Street Ry. Co. v. Railroad Commission,* 324 US 458, 562, 89 L.Ed. 1171, 1182, 65 S.Ct. 770 (1945). See also *Morgan v. United States,* 298 US 468, 480, 80 L.Ed. 1288, 1294, 56 S.Ct. 906 (1935).

The three rules being appealed adopt what appear to be contradictory positions. On the one hand, it is conceded that an 80%-20% division of revenues is inequitable for transportation on public works construction projects

under one of the tariffs. On the other hand, the 80%-20% division is deemed equitable for other construction projects. The only justification for this distinction between the two types of construction work would be some factual difference in the work involved in each type of project. Yet this issue, whether such a factual difference exists, was never raised by the pleadings, addressed by the evidence or subjected to the tests of cross-examination and rebuttal. Here is the very essence of the denial of due process.

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2. BY APPLYING A DIVISION OF REVENUES TO DUMP TRUCK HAULING FOR NON-PUBLIC CONSTRUCTION THE COMMISSION ACTED ARBITRARILY AND WITHOUT RATIONAL BASIS.

The distinction drawn between dump truck carriers working on construction projects for public agencies and those working on private or commercial construction projects is, on its face, arbitrary and lacking in any rational relationship to the purpose of the PUC's regulatory scheme. The avowed purpose of the regulation is to ensure that subhaulers are adequately compensated for their work by overlying carriers. The public or private character of the shipper can have no bearing on the amount of compensation to which any underlying carrier is entitled.

What the PUC has, in effect, done is to make the amount of compensation to be paid a subhauler depend on whether the source of funds for the construction project is public or private, and not on the nature of the work performed by the subhauler. It cannot rationally

be suggested that the costs of providing dump truck service on a project to build a shopping center depend on whether the project is financed with public rather than private funds. It is a meaningless proposition that a dump truck carrier's costs of providing service on a project to construct a car park for a supermarket are any greater than on a project to construct a car park for government employees. A subhauler would not care whether he was engaged on a project for building government offices or on a project to construct a private office block except for the fact that the Commission's regulations now make that consideration crucial in determining how much the subhauler is entitled to be paid.

Appellants are aware that the orders being challenged are regulations of a purely economic nature and that this Court affords States a very wide latitude in drafting such regulations. Nevertheless, to stay within constitutional limits, a classification "must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, C & SFR Co. v. Ellis,* 165 US 150, 155, 41 L.Ed. 666, 668, 175 S.Ct. 255 (1897). In a very recent case, this Court has described the test of constitutionality as being whether "the State's classification rationally furthers the purpose identified by the State". *Massachusetts Board of Retirement v. Murgia,* ___ US ___, 49 L.Ed.2d 520, 525, ___ S.Ct. ___ (1976).

In the present case, the Public Utilities Commission has expressly stated what the purpose of its regulations is, namely, to provide "for compensation to carriers

which furnish units of equipment consisting of a tractor and a driver without trailing equipment for the movement of commodities" covered by MRT's 7-A, 17-A and 20. Orders Setting Hearing 238 in Case No. 5437. The classification between carriers providing transportation on public and non-public works construction projects cannot rationally be said to further the purpose of the regulations.

---

3. THE COMMISSION WAS UNABLE TO PROVIDE ANY EVIDENTIARY BASIS FOR ITS DECISIONS.

Repeatedly Appellants have challenged the Commission to justify its decision in these proceedings. As often, the Commission has refused or has merely referred to its opaque findings.

Even before the Commission issued its three decisions, Appellants questioned the Commission Staff's proposal to limit the exception only to public works construction projects.

> "The Commission Staff has filed exceptions to Findings of Fact Nos. 31 and 32 by proposing a limitation upon their application to transportation performed on a public works construction project. The issue of the application of the proposed rules to a public works construction project [w]as never raised during the hearings. The Staff gives no reasons in support of these exceptions. The letter of Mr. William R. Johnson, dated November 13, 1975, accompanying the proposed Report of Examiner Mallory, required that exceptions to factual findings specify the portions of the record relied upon. Since the Staff's proposed revision of Findings of Fact Nos. 31 and 32 relates

to an issue completely beyond the record in this proceeding, and since no reasons have been given for limiting the application of those findings to public works construction projects, these revisions are inappropriate." (Replies of Southern and Northern Overlying Carriers Chapter to Answers to Exceptions of Other Parties to Proposed Report of J. W. Mallory, p. 12.)

The Commission provided no answer whatever to Appellants' objection in Decision No. 85918 or in the two companion decisions.

Appellants again raised an identical objection in their Petition for Rehearing and Reconsideration filed with the PUC on June 18, 1976, at page 15. In denying rehearing by Decision No. 86322, dated August 24, 1976, the Commission again declined to answer the objection.

In Appellant's Petition for a Writ of Review filed with the California Supreme Court, one of the errors specified by Appellants was that:

"(c) The Commission's exemption, from the division of revenue Order, of those dump truck operations falling under minimum rate tariff 7-A (MRT 7-A) and performed on public works construction projects constitutes a violation of the due process [clause] of the Fourteenth Amendment of the United States Constitution and of the due process clause of the California Constitution, as well as a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution." (Petition for a Writ of Review, p. 13.)

In the attached memorandum of Points and Authorities (at p. 7) Appellants elaborated on this objection. At this

point the Commission apparently felt obliged to provide some sort of answer to this persistent objection but the answer was woefully inadequate. The Commission merely referred to its findings in Decision No. 85918, and in particular Findings 25-32, and concluded with the following assertion:

"Respondent [the Commission] submits that the Commission did not err in excluding public works projects from the order and, further, that such action was a sound exercise of its policy-making responsibility in regulating public carriers." (Answer of Respondent in Petition for Writ of Review, p. 7.)

A reiteration of the Commission's findings obviously cannot constitute a refutation of the charge that those findings are without evidentiary support. Nor can the invocation of the Commission's undoubted "policy-making responsibility in regulating public carriers" allay the charge that Appellants were denied due process.

Dissatisfied with the Commission's answer, Appellants tried once more. In their reply to Respondents' Answer to Petition for Writ of Review, Appellants groped for some formulation of the objection that would compel the Commission to reveal the basis for its regulations. Respondents' Answer, pp. 13-16. The Supreme Court of California denied a writ of review without opinion and Appellants were still in the dark as to why public works construction projects had been singled out for special treatment.

At this point, Appellants were beginning to suspect that there was no reason for such treatment. Nevertheless, the Commission was challenged once more. Ap-

pellants petitioned the California Supreme Court for rehearing, pointing out that the Commission had not yet found any evidence to support its decision to modify Examiner Mallory's recommended findings concerning construction projects. Petition for Rehearing and Stay of Effective Date of Order, page 5.

The Commission's response to the Court was no more enlightening than its others had been:

> "Petitioner only raises one allegation in its brief: that the Commission erred in excluding public works projects in its Decision No. 85918. This same argument was made by Petitioner in its Petition for Review, was answered by Respondent and was rejected by this Court in its decision denying the Petition for Review." (Letter to the Chief Justice of the Supreme Court of the State of California, dated January 18, 1977.)

Five times Appellants have thrown down the gauntlet and challenged the Commission to justify its decision concerning public works construction projects. Five times the Commission has walked away from the challenge. Once more we challenge the Commission to answer the simple question: why did you exempt only MRT 7-A transportation in connection with public works construction projects and not all transportation in connection with all construction projects? We believe that constitutionally we are entitled to an answer. This Court, in *Goldberg v. Kelly*, 397 US 254, 271, 25 L.Ed.2d 287, 301, 90 S.Ct. 101 (1970), held that one of the requirements of minimum due process is that a person adversely affected by an administrative agency decision be informed of the reasons for that decision. In withholding an answer to this question, the Commission has denied and continues to deny Appellants procedural due process.

CONCLUSION

It is submitted that in attempting to regulate dump truck trailer rental, the PUC hopelessly failed in its job and, in so doing, trampled over Appellants' due process rights. The record demonstrates that the PUC, in issuing its three orders, violated the Fourteenth Amendment to the United States Constitution and subjected Appellants' members to severe economic injury. The questions presented by this appeal are substantial, and this Court has the jurisdiction and the duty to correct the miscarriage of justice committed by the California Commission.

Respectfully submitted

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Of Counsel

Date: April 29, 1977

(Appendices Follow)

APPENDICES

Appendix A

ORDER DENYING WRIT OF REVIEW

San Francisco No. 23531

In The Supreme Court Of The State Of California
In Bank

Southern and Northern Overlying Carrier Chapters of the California Dump Truck Owners Association,

vs.

The Public Utilities Commission, etc.

[Filed Jan. 5, 1977]

Petition for writ of review DENIED.

/s/ Wright, Chief Justice

Appendix B

Clerk's Office, Supreme Court
4250 State Building

San Francisco, California 94102
February 7, 1977

I have this day filed Order REHEARING DENIED.

In re: San Francisco, No. 23531

Southern and Northern Overlying Carrier Chapters

vs.

PUC

Respectfully,
G. E. Bishel
Clerk

Boris H. Lakusta, Esq.
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Appendix C

Decision No. 85918

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of sand, rock, gravel and related items in bulk, in dump truck equipment between points in California as provided in Minimum Rate Tariff 7-A and the revisions or reissues thereof.	Case No. 5437 Order Setting Hearing 238 (Filed January 16, 1973) Petition for Modification No. 240 (Filed February 9, 1973; amended February 4, 1975) Petition for Modification No. 285 (Filed February 28, 1975; amended May 27, 1975)
In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of rock, sand, gravel and related items in bulk, in dump truck equipment in Southern California as provided in Minimum Rate Tariff 17-A and Southern California Production Area and Delivery Zone Directory 1, and the revisions or reissues thereof.	Case No. 9819 Petition for Modification No. 4 (Filed February 4, 1975) Petition for Modification No. 7 (Filed February 28, 1975; amended May 27, 1975)
In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of rock, sand and gravel in bulk, in dump truck equipment in Northern California as provided in Minimum Rate Tariff 20 and Northern California Production Area and Delivery Zone Directory 2, and the revisions and reissues thereof.	Case No. 9820 Petition for Modification No. 1 (Filed February 4, 1975) Petition for Modification No. 3 (Filed February 28, 1975; amended May 27, 1975)

(Appearances are shown in Appendix A to
Proposed Report of Examiner J. W. Mallory.)

OPINION

The Proposed Report of Examiner J. W. Mallory was issued in these proceedings on November 13, 1975. The matters were submitted upon filing of replies to exceptions to the proposed report on February 2, 1976.

A copy of the proposed report is attached. The statement of the nature of the proceeding, the summary of evidence adduced, and the outline of the positions of the several parties as set out in the proposed report are adopted and need not be repeated herein.

The proposed report contains 36 recommended findings of fact and 4 conclusions of law. Exceptions to certain of the examiner's recommended findings and all of his recommended conclusions were made.[1]

Generally, each party's exceptions and replies strongly support its position taken during the course of the hearing. CDTOA and the staff urge that the Commission adopt the findings that support the establishment of divisions of revenues between overlying and underlying carriers, and oppose those findings which indicate the reasons that further division of such revenues are inappropriate. Conversely, Overlying Carriers and CTA oppose those findings leading to the establishment of divisions of revenues between underlying and overlying carriers and support those findings which are contrary thereto.

---

[1]Exceptions were filed by California Trucking Association (CTA), California Dump Truck Owners Association (CDTOA), Northern and Southern California Overlying Carrier Chapters of California Dump Truck Owners Association (Overlying Carriers), and the Commission staff. Replies to exceptions were filed by CDTOA, Overlying Carriers, and the staff. No exceptions or replies were filed by petitioner, Associated Independent Owner-Operators, Inc. (AIOO).

Many of the exceptions and replies reiterate the interpretation of the evidence (or lack thereof) taken by the parties at the hearing and need not be restated. Several arguments again raised in the exceptions and replies had been laid to rest in Decision No. 83672 dated October 29, 1974 in Case No. 5437 (OSH 238), (Decision No. 83852 dated December 17, 1974, denied rehearing of Decision No. 83672). However, certain points raised in the exceptions and replies require additional amplification and discussion beyond that contained in the proposed report.

Summary of Recommended Findings

The key to the issues raised by the staff in OSH 238 and by petitioners CDTOA and AIOO in related proceedings is the so-called 95 percent rule in MRTs 7-A, 17-A, and 20. Under the rule, revenues under the minimum rates in those tariffs are divided 95 percent to underlying carriers and 5 percent to overlying carriers. As pointed out in prior Commission decisions, the 5 percent allocated to overlying carriers is intended to cover the so-called brokerage services provided by such carriers on behalf of underlying carriers employed by them. Decision No. 78965 (involving the same issues as raised herein) found the tariff provisions allocating minimum rate revenues between carriers never were tested by studies which include specific cost data relating to services performed by overlying carriers for underlying carriers (Recommended Finding 8). The staff cost studies underlying MRT 7-A are based on the operation of a full unit of carrier equipment by a carrier serving a shipper directly who neither operates as a subhauler nor as an overlying carrier (Recommended Finding 4).

Overlying carriers engaged in performance of work on construction projects consider the 5 percent allocated to them to be insufficient to cover the services performed by them on behalf of the contractor and the subhaulers on the construction projects[2] (Recommended Finding 25). Trailer rental fees (the subject of these proceedings) are used by overlying carriers to recoup the additional revenues they believe are necessary to cover their expenses which are in excess of the amounts provided by the present 5 percent brokerage fee (Recommended Finding 26). That finding states that the trailer rental fees assessed are greater than necessary to cover the reasonable expenses associated with the furnishing of trailing equipment to pullers.

The cost and other evidence adduced show that the combined operations of an overlying carrier and a tractor-

[2]The proposed report describes such services as follows:

1. Obtaining work through bidding of jobs. This purportedly involves the surveying of potential construction projects; determining the trucking requirements for the project; preparing the trucking portion of the contractor's bid; and advising the contractor on rates, sources of materials, and other factors.
2. Servicing the contractor, by determining the daily number of vehicles required, placing trucking supervisors at loading and discharge points, and advising contractors concerning the daily work accomplished.
3. Preparation of freight bills for underlying carriers and advising them concerning rates.
4. Supplying capital to contractors and underlying carriers by paying the latter for their services in advance of the receipt of payment from contractors.
5. Furnishing fuel, tires, and repairs to underlying carriers at cost, based on volume discounts or credit arrangements accorded to the overlying carrier by its suppliers.
6. Providing parking for subhaulers' equipment at or near jobsite without cost.
7. Providing liability insurance for trailer equipment owned by the overlying carrier under limits in excess of that available to subhaulers operating single units.

only subhauler for transportation on construction projects produce total costs in excess of the costs which underlie the present rates in MRT 7-A; no division of the present minimum rates in MRT 7-A between a tractor-only subhauler and an overlying carrier for services on construction projects can be equitable to both (Recommended Finding 31).

Staff Exceptions

While purporting to except to the findings recited above the Commission staff confirms them in the following statements extracted from the staff replies to exceptions:

> "The staff agrees that the costs upon which the present minimum rates were developed represent full unit carrier costs. . . . The conclusion that the 5 percent fails to compensate the overlying carriers for their 'brokerage services' is an improper conclusion based on a misunderstanding as to what services are included in the rates in MRT 7-A.
>
> "The costs for full units of equipment upon which the present minimum rates were established do not include all of the following services by the overlying carriers:
>
> "(a) Obtaining work through bidding of jobs. This purportedly involves the surveying of potential construction projects; determining the trucking requirements for the project; preparing the trucking portion of the contractor's bid; and advising the contractor on rates, sources of materials, and other factors.
>
> "(b) Servicing the contractor, by determining the daily number of vehicles required, placing trucking supervisors at loading and discharge points, and advising contractors concerning the daily work accomplished.

"(c) Supplying capital to contractors and underlying carriers by paying the latter for their services in advance of the receipt of payment from contractors."

The staff reply to exceptions goes on to say:

"The functions set forth above are not transportation services nor can they be categorized as accessorial services. They may well be the functions of a Motor Transportation Broker. These functions are not part of the transportation service of a reasonably efficient carrier and have no place in the scheme of minimum rate regulation. If the overlying carriers are not Motor Transportation Brokers and wish to perform such services then they should recapture these costs by assessing a rate or charge higher than the minimum rate. With the removal of the above services from the costs of performing the transportation service the minimum rates then will return to the carriers their full costs. Therefore, the application of the 95% rule is reasonable and the Commission should find for an equitable division of rates in MRT 7-A."

It follows from the above statements of the staff that if the overlying carrier on a construction project is not, in fact, a carrier and is some other entity not subject to the provisions of MRT 7-A, the minimum rates in that tariff would apply to the subhauler (rather than the overlying carrier) and the so-called 95 percent rule would not be invoked.[3] A motor transportation broker may assess

[3]Motor transportation brokers are regulated under Chapter 5 of Division 2 of the Public Utilities Code (§§ 4801-4880). Motor Transportation Brokers act as intermediaries between the public and highway carriers of property for compensation, and negotiate or sell transportation services. A license is required to operate as a motor transportation broker (§ 4832). The Commission may regulate the rates, charges, contracts, operations, and practices of a motor transportation broker (§ 4871).

any charge to the carrier for the service of arranging the transportation service absent the establishment of rules governing its rates.[4] The carrier must, of course, charge the shipper not less than the applicable minimum rate. If present overlying carriers are regulated as transportation brokers, and present underlying carriers assess the minimum rates, but are free to negotiate with brokers for charges, the situation would be very little different from the existing situation where the overlying carrier (broker) negotiates its fee through assessment of trailer rental charges in excess of the fair rental value of the trailers furnished to subhaulers.

The staff also overlooks the fact that any full-unit carrier (one who hires no subhaulers) would be required to perform the services outlined in paragraphs (a) and (b) because those services are required in connection with dump truck transportation services on construction projects, irrespective of whether a carrier with its own equipment is employed or an overlying carrier is employed. Not to include those services in the basic cost data for a full-unit operator results in the failure of the staff cost studies to recognize the true nature of the dump

[4]The leading case with respect to motor transportation brokers is *Leonard F. Schempp* (1947) 47 CRC 510. Schempp held highway carrier permits. Some hauling was performed with his own equipment, but for the bulk of the hauling for which a license was sought Schempp intended to use subhaulers. The decision states that it is well-established that one who is himself a carrier cannot act as a broker with respect to transportation over his own line. *Schempp* also held that a broker is an intermediary between the shipper and the carrier, his status is that of an agent, which is clearly distinguishable from a carrier-shipper relationship. *Schempp* further states that it is not a broker's proper function to issue bills of lading, either as a shipper or carrier, nor to issue, in his own name, freight bills to cover transportation charges, nor to hold himself out as a carrier.

truck services required and performed on a construction project. The only remedy for such failure is to prepare new cost studies which include factors (a) and (b) in operating costs. It is apparent from evidence adduced by overlying carriers that if provision had been made for those factors in the staff cost studies, the costs for hauling on construction projects would be substantially greater than the costs which underlie the present MRT 7-A minimum rates, and the need for overlying carriers to extract from subhaulers sums greater than the fair rental value of trailers furnished by them would disappear.

Separate findings and conclusions were reached by the examiner with respect to MRTs 7-A, 17-A, and 20. The examiner's findings and conclusions with respect to MRT 7-A concerned dump truck work on construction projects. The staff, in its exceptions, correctly points out that all dump truck transportation covered by MRT 7-A does not involve work performed on construction projects and proposes that the broad findings regarding MRT 7-A be limited to the construction projects defined in Item 260 of MRT 7-A. For the balance of transportation services covered by MRT 7-A a division of revenues between overlying and underlying carriers for trailer rental would be established in the same manner as for MRTs 17-A and 20. Those exceptions of the staff are well-taken and will be adopted.

Exceptions of Overlying Carriers

Overlying Carriers take exception to what they term the explicit finding that there is a need for establishing a division of revenue by imposing fixed limitations upon

trailer rental agreements entered into between overlying and underlying carriers, in the absence of a finding that the current trailer rental practices in the industry are unreasonable and discriminatory or that such a division of revenue is necessary to assure reasonable rates to the general public.

Taking the latter premise first, MRTs 7-A, 17-A, and 20 now provide for divisions of revenues between overlying and underlying carriers. Those tariff provisions were established without a finding that the provisions were needed to assure reasonable rates to the general public. The practice of trailer rental stems from those tariff provisions and began after those tariff provisions were established.

With regard to the first point, Overlying Carriers' witnesses openly and freely testified that trailer rental charges are imposed by them which are greater than the reasonable rental value of the trailers in order that they may recoup costs associated with services performed on construction projects which are in excess of 5 percent of the minimum rates allocated to overlying carriers. The proposed report would establish fixed limitations on trailer rentals on work other than on construction projects, where the present 5 percent brokerage fee appears appropriate and no economic need appears to exist for the assessment of trailer rental charges in excess of the reasonable rental value of the trailers furnished. Recommended Findings 18, 24, 25, 26, 27, 29, 30, 31, and 34 cover the points just described. Those findings, taken together, indicate that present trailer rental charges are unreasonable and discriminatory to the extent that such

charges exceed the reasonable rental value of the equipment furnished for all dump truck transportation services, except those services which are conducted on construction projects. An additional finding to that effect will be made herein.

Overlying Carriers also take exception to the establishment of divisions of revenues for trailer rental in MRTs 17-A and 20 without a presentation of cost studies based on the actual cost of an underlying carrier that furnishes only tractor equipment and the costs of an overlying carrier that supplies trailer equipment and services to underlying carriers. We have reviewed the cost and other data of record and find that, taken together, such data are sufficient, adequate, and suitable as a basis for the further division of carrier revenues recommended by the examiner, even though no specific costs have been furnished covering the brokerage services performed by overlying carriers on behalf of underlying carriers. Inclusion of brokerage and trailer rental in the same charge will provide a simplified method of allocating revenue between overlying and underlying carriers. Transportation on construction projects, where subhaulers perform most of the transportation services and trailer rental is the standard practice, will not be affected until further proceedings are completed and the results have been evaluated.

Discussion

If we are to accept the concept (advanced by the staff for the first time in the staff replies to exceptions) that overlying carriers are motor transportation brokers, we either must reopen this proceeding to explore the changes

in regulatory practices that result or we must initiate a new proceeding for that purpose. No useful purpose would be served by reopening this proceedings.[5] The staff concept should be explored in a separate proceeding in which the Motor Transportation Brokers Act (§§ 4801-4880) is fully explored. The record in this proceeding is not sufficient to reach findings and conclusions on that point.

The order herein will establish divisions of revenues under minimum rates in MRT 17-A and MRT 20 as recommended in the proposed report and also will establish such divisions in MRT 7-A except for work on construction projects. The combined amounts for trailer-rental and brokerage should be raised from 15 percent, as recommended by the examiner, to 20%, which we deem to be a more equitable division of revenues between overlying and underlying carriers and is consistent with the staff proposal herein. The examiner's recommended findings will be modified accordingly. The order herein also will provide a deduction from charges in those minimum rate tariffs when trailer equipment is furnished by persons responsible for the payment of freight charges (shippers), and the amount of trailer rental will be revised from 14 percent, as recommended by the examiner, to 15 percent which we deem reasonable and consistent with the charge for trailers furnished by overlying carriers.

We have carefully considered all of the exceptions to the recommended findings and conclusions and the replies

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[5]This proceeding has extended over a long period, partly because of unresolved matters pending before the National Labor Relations Board (NLRB) involving the status of subhaulers employed on construction projects.

thereto. No need appears to discuss in detail exceptions or replies except to the extent set forth above. The examiner's recommended findings and conclusions have been revised to incorporate those exceptions and replies deemed to have merit.

Anti-Competitive Practices

The practice under which underlying carriers are required to rent trailers from the overlying carrier as a condition of employment and the basis of charging for the use of the trailers as a factor separate from the brokerage charge constitute a tying arrangement which may be a per se violation of Section 1 of the Sherman Act (15 USC § 1). The trailer-rental service is tied to the brokerage service in such a manner that competition is restricted in that no entity other than the overlying carrier (broker) or his agent can furnish trailers at any price to the underlying carrier, nor can the underlying carrier furnish his own trailer. The order which follows will provide that overlying carriers cannot require that underlying carriers rent or lease trailers as a condition of employment.

Findings of Fact

1. Minimum rates for the transportation of rock, sand, gravel, earth, asphaltic concrete, and related commodities in bulk in dump trucks are set forth in MRTs 7-A, 17-A, and 20.

2. The minimum rates set forth in MRTs 7-A, 17-A, and 20 are developed from cost data prepared by and introduced into evidence by the Commission staff.

3. The cost data underlying MRT 7-A was originally introduced into evidence as Exhibits 213-46 and 213-65 in Case No. 5437 (OSH 213). The most recent updating of the cost data in OSH 213 was introduced into evidence in Case No. 5437 (Petition 265) as Exhibit 265-71.

4. The staff cost studies referred to in the preceding finding are based on the operation of a full unit of carrier's equipment by a carrier serving a shipper directly, who neither operates as a subhauler nor as an overlying carrier.

5. A substantial amount of the dump truck services subject to the provisions of MRT 7-A are contracted for by overlying carriers who employ subhaulers to perform the transportation services.

6. Item 210 of MRT 7-A (formerly Item 94 of MRT 7) and related items in MRTs 17-A and 20 provide that charges paid by an overlying carrier to an underlying carrier shall not be less than 95 percent of charges applicable under the minimum rates, less liquidated amounts. Under this tariff provision 5 percent of the minimum rate revenue is allocated to the overlying carrier for services performed by it.

7. Item 210 of MRT 7-A and related items in MRTs 17-A and 20 do not contain provisions which set a maximum amount for the rental of trailers furnished to subhaulers by overlying carriers, nor do such tariffs divide the charges under minimum rates between subhaulers furnishing driver and tractor (or truck) and overlying carriers furnishing trailers.

8. In a prior proceeding involving the provisions of Item 94 of MRT 7, the Commission found as follows:

> "2. The existing provisions of Item 94 of MRT 7 were established on data relating to industry practices, some 20 years ago; substantially identical provisions were subsequently incorporated in Item 460 of MRT 17; and the provisions of Item 94 of MRT 7 and Item 460 of MRT 17 *never have been tested by studies which include specific cost data relating to services performed by overlying carriers for underlying carriers.*" (Emphasis supplied.) (Page 18 of mimeo. Decision No. 78965 issued on December 8, 1970 in Petition 112 and Order Setting Hearing in Decision No. 72028 dated February 15, 1967.)

9. Since the establishment of Item 94 of MRT 7, it has become an increasing practice for overlying carriers to employ subhaulers who furnish a tractor (or truck) with driver (puller) and who pull a trailer or set of trailers owned by the overlying carrier. CDTOA estimates that there are in excess of 1,000 pullers holding permits as dump truck carriers.

10. Pullers also lease trailing equipment from shippers. The extent of this practice cannot be determined from the record, but the practice appears to be minimal compared with the operations of pullers for overlying carriers.

11. Order Setting Hearing 238 was issued to receive evidence with respect to proposals of the Commission's Transportation Division concerning revision of MRTs 7-A, 17-A, and 20 to incorporate therein rules providing for compensation to carriers which furnish units of equipment consisting of a tractor and driver without trailing

equipment for the movement of commodities covered by said tariffs. Cost data and other evidence were presented by the Commission staff witnesses to support the staff proposal.

12. AIOO seeks in Petition 240, as amended (and related proceedings), modification of MRTs 7-A, 17-A and 20 by incorporating therein rules providing for the compensation to be paid to overlying carriers who furnish trailing equipment without power units to subhaulers for the movement of commodities covered by said tariffs. Cost data and other evidence were presented by AIOO in support of its proposals.

13. OSH 238 and Petition 240 were heard on a consolidated record in February and March 1974, and the matters were removed from the calendar in order to rule on the motion to dismiss the proceedings filed by CTA which opposes the relief sought. Decision No. 83672 dated October 29, 1974 denied the motion to dismiss and ordered that further hearings be held. Decision No. 83672 placed the parties on notice that the Commission considers that the reasonableness of the provisions of Item 210 (Payments to Underlying Carriers) of MRT 7-A and related provisions of MRTs 17-A and 20 is an issue in OSH 238 and Petition 240.

14. CDTOA seeks in Petition 285 (and related proceedings) to amend MRTs 7-A, 17-A, and 20 by incorporating therein rules providing for the compensation to be paid to underlying carriers operating a power unit which pulls non-owned dump trailer and/or semitrailer equipment. Evidence was presented in support of that proposal.

15. CTA opposes the addition of any rules which prescribe the division of minimum rate revenues between overlying carriers furnishing trailers and pullers. As an alternative to the proposals of the staff, CDTOA, and AIOO, CTA proposes that Item 210 of MRT 7-A (and related provisions of MRTs 17-A and 20) be cancelled, and General Order No. 130 (Rules Governing Leasing of Motor Vehicles by Highway Permit Carriers) be amended to require the filing of leases or rental agreements for use of trailing equipment furnished by an overlying carrier to an underlying carrier. Evidence was offered in support of CTA's proposals.

16. Overlying Carriers also oppose the additional rules proposed by the staff, AIOO, and CDTOA. Evidence in support of its position was offered.

17. California Asphalt Pavement Association (CAPA), appearing as an interested party, opposes any increase in the so-called brokerage fee (the 5 percent of the minimum rate allotted to the overlying carrier under provisions of Item 210 of MRT 7-A and related provisions of MRTs 17-A and 20). CAPA has no objection to the establishment of tariff provisions dividing the charges under minimum rates in MRTs 7-A, 17-A, and 20 between pullers and overlying carriers or shippers that furnish trailer equipment. Evidence in support of its position was presented by CAPA.

18. The record indicates that under current practices overlying carriers assess trailer rental charges ranging from 15 to 30 percent (exclusive of the 5 percent brokerage fee) and that the most frequently assessed trailer rental fees are 20 or 25 percent. The record does not

contain information concerning the trailer rental charges currently imposed by shippers.

19. The staff, AIOO, and CDTOA allege that provisions establishing a division of minimum rate revenues between pullers and overlying carriers furnishing trailers are urgently needed to protect pullers. None of those parties urge that any particular level of trailer rental fees now assessed is unreasonable or discriminatory.

20. Revenues under the minimum rates in MRTs 7-A, 17-A, and 20 are proposed to be divided as follows:

Commission Staff:

Tractor (Truck) and Driver—85 percent (less 5 percent of 85 percent for brokerage fee)

Trailer Owner—15 percent (plus 5 percent of 85 percent if an overlying carrier)

AIOO:

Tractor (Truck) and Driver—80 percent (less 5 percent of 80 percent for brokerage fee)

Trailer Owner—20 percent (plus 5 percent of 80 percent as brokerage fee if an overlying carrier)

CDTOA:

Tractor (Truck) and Driver—80 percent (less 5 percent of 100 percent as brokerage fee)

Trailer Owner—20 percent (plus 5 percent of 100 percent if an overlying carrier)

21. The cost data presented by the staff divides the total operating costs for a full unit (at 100 operating ratio) between the tractor (truck) and driver and the trailer(s). The cost data is based on exhibits previously introduced by the staff in Exhibits 213-46, 213-65, and

265-71, except that the indirect expense ratio is reduced to 7 percent and the present 5 percent brokerage fee is included in tractor-driver costs as a portion of indirect expenses. Representative of the division of costs developed in Exhibit 238-12 are the following:

Five-Axle Bottom Dump Unit

Hourly Costs (straight time)	
Total Cost — Full Unit	$21.982
Total Cost — Power Only	$19.048
Power Unit as % of Total Unit	86.7
Distance Costs	
5 Miles	
Total Cost — Full Unit	$ 0.565
Total Cost — Power Only	$ 0.496
Power Unit as % of Total Unit	87.8
50 Miles	
Total Cost — Full Unit	$ 2.805
Total Cost — Power Only	$ 2.397
Power Unit as % of Total Unit	85.5

22. Cost data presented by AIOO divides total operating costs for a full unit in a manner similar to the staff data. AIOO's cost study also uses a 7 percent indirect expense ratio and includes the 5 percent brokerage fee as a portion of indirect expenses. The cost data developed in Table 6 of Exhibit 240-1 is as follows:

	5-Axle Double Bottom Unit	5-Axle Truck and Transfer Trailer
Average Cost per Revenue Hour at 100 O.R.	$21.352	$21.486
Average Total Cost Power Unit Only	$18.658	$19.901
Power Unit as % of Total Unit	87.38	92.62

23. Cost data presented by CDTOA was designed to show that pullers experience lower indirect expenses than

operators of full units; for example, Exhibit 285-3 shows that in 1974 the average indirect expense ratio for pullers was 7.23 percent, compared to 11.41 percent for tractor- and bottom-dump trailers operated as a full unit.

24. Based solely on the cost data in Exhibits 238-12 and 240-1, the reasonable division of the revenue under minimum rates in MRT 7-A for the operation of a power unit and driver would be 86 percent, and for the trailer(s) would be 14 percent, with no provision for a brokerage fee.

25. Evidence was presented on behalf of CTA and Overlying Carriers to show that overlying carriers engaged in work on public works construction projects consider that the 5 percent of minimum rate revenues allotted to them under provisions of Item 210 of MRT 7-A is insufficient to cover the services performed by them on behalf of the contractor and the subhaulers employed on public works construction projects. This assumption was confirmed by the analysis of the operating statements of eight overlying carriers in Exhibit 238-15, presented by Overlying Carriers, and in the testimony presented on behalf of that organization.

26. Overlying carriers appearing for CTA testified that trailer rental fees are used by them to recoup the additional revenues which they believe are necessary to cover their expenses as overlying carriers which are in excess of the amounts provided by the present 5 percent brokerage fee. The testimony shows that the trailer rental fees assessed are greater than necessary to recover the reasonable expenses associated with the furnishing of trailing equipment to pullers.

27. The proposal of AIOO that trailer-rental be based on a maximum of 20 percent of the revenue accruing under the minimum rates was made in recognition that overlying carriers experience expenses which are not fully compensated for under the present 5 percent brokerage fee; therefore, the difference between 20 percent and the 12.2 to 14.5 percent of total cost allocated to trailing equipment in AIOO's Exhibit 240-1 represents that witness's judgment as to the amount of additional revenue which should be accorded to the overlying carrier for services not compensated for under the present 5 percent brokerage fee.

28. In the establishment of minimum rates pursuant to Section 3662 of the Public Utilities Code, it has been the policy and procedure of the Commission to determine the cost of performing transportation in a reasonably efficient manner by the type of carrier best suited to provide the service, and then to determine those rates which will return that cost plus a reasonable profit. In the case of transportation of rock, sand, gravel, and earth on public works construction projects, the Commission determined that the reasonably efficient carrier was one that furnished a full unit of equipment and did not operate either as an overlying carrier or as a subhauler.

29. The record shows through the testimony of AIOO, CTA, and Overlying Carriers that the existing provisions of Item 210 of MRT 7-A are unreasonable in that the divisions of the charges under minimum rates in MRT 7-A fails to adequately compensate overlying carriers for the services performed on public works construction projects.

30. The evidence in Exhibits 238-12 and 240-1 shows that pullers who operate as subhaulers for overlying carriers that furnish trailers are inadequately compensated for their services to the extent that such pullers receive less than 86 percent of the charges under the minimum rate.

31. The cost data and other evidence adduced herein show that the combined operations of an overlying carrier and a tractor-only subhauler for transportation of rock, sand, gravel, and earth on public works construction projects produce total costs in excess of the costs which underline the present rates in MRT 7-A; therefore, no division of the present MRT 7-A minimum rates between a tractor-only subhauler and an overlying carrier can be equitable to both for transportation performed on a public works construction project (as defined in Item 260 of MRT 7-A).

32. Further division of the minimum rates in MRT 7-A between pullers and overlying carriers as proposed in OSH 238 and Petitions 240 and 285 will not result in just and reasonable minimum rates for transportation performed on a public works construction project (as defined in Item 260 of MRT 7-A).

33. The minimum rates set forth in MRTs 17-A and 20, which are applicable from fixed plant locations and the minimum rates in MRT 7-A applicable to transportation other than on a public works construction project are sufficient to cover the combined operating expenses of tractor-only subhaulers and overlying carriers furnishing trailers.

34. No economic need appears to exist for the assessment by overlying carriers of trailer rental charges in excess of the reasonable rental value of the trailers furnished in connection with transportation services performed under MRTs 17-A and 20 or in connection with transportation other than on public works construction projects under MRT 7-A, and such trailer rental charges are an unreasonable burden on subhaulers providing such transportation services under provisions of MRTs 7-A, 17-A, and 20.

35. MRT 7-A (except for transportation on a public works construction project) and MRTs 17-A and 20 should be amended to provide a division of revenue under the minimum rates set forth therein between tractor-only subhaulers and overlying carriers furnishing trailers. The reasonable division of revenues, based on cost data set forth in Exhibits 238-12 and 240-1, is 80 percent to the tractor-only subhauler and 20 percent to the overlying carrier supplying trailers, with no provision for assessment of additional brokerage fees. Commission staff proposals amended to provide for division of revenues in such manner will result in just, reasonable, and non-discriminatory tariff rules and should be incorporated in MRTs 17-A and 20 and in MRT 7-A for service other than transportation on a public works construction project.

36. In prior enforcement proceedings the Commission has found that trailer rentals paid by highway permit carriers to shippers in excess of the fair rental value of the equipment furnished (expressed as a percentage of revenue under the minimum rates applicable to the transportation services in which the trailers are used) is an

unlawful rebate in violation of the Highway Carriers' Act. Rules should be established in MRTs 7-A, 17-A and 20 prohibiting the payment of excessive trailer rentals to shippers in order to prevent unlawful rebates. Based on the data in Exhibits 238-12 and 240-1, trailer rental paid to a shipper which is greater than 15 percent of the revenues accruing under the minimum rate applicable to the transportation in which such trailers are used is excessive and should be prohibited.

37. The proposal of CTA that Item 210 of MRT 7-A (and related items in MRTs 17-A and 20) be cancelled is beyond the announced scope of the consolidated proceedings.

38. The practice of trailer rental is common in connection with transportation services under MRTs 7-A, 17-A, and 20, and a substantial amount of dump truck transportation service is performed under such arrangements. When the use of a trailer owned or furnished by an overlying carrier is a condition of employment and an underlying carrier cannot use a trailer owned by it or acquired from an entity other than the overlying carrier, the trailer rental is a tied service to the brokerage service offered by the overlying carrier. Such tying arrangement restricts competition and may constitute a violation of the Sherman Act (15 USC § 1).

Conclusions of Law

1. MRTs 7-A, 17-A, and 20 should be amended to incorporate therein the tariff provisions found reasonable in the above findings.

2. To the extent not adopted in preceding findings, the proposals of the staff in OSH 238 and of petitioners in Petitions 240 and 285 in Case No. 5437 (and related petitions) should be denied.

3. Adequate notice that the Commission would consider the proposals of CTA was not afforded all respondents; therefore, such proposals may not be considered herein.

4. Further proceeding should be instituted to determine the method under which adequate total compensation can be achieved for the combined operations of overlying carriers furnishing trailing equipment and subhaulers operating as pullers for transportation on a public works construction project under the provisions of MRT 7-A.

5. In order to avoid duplication of tariff distribution, MRT 7-A should be amended by the order which follows and MRTs 17-A and 20 should be amended by separate orders.

6. The order herein should specifically prohibit an overlying carrier from requiring an underlying carrier to use trailers owned or controlled by the overlying carrier as a condition of employment.

ORDER

It Is Ordered that:

1. Minimum Rate Tariff 7-A (Appendix B to Decision No. 82061, as amended) is further amended by incorporating therein, to become effective July 10, 1976, the revised pages contained in Appendix A, attached hereto and by this reference made a part hereof.

2. Common carriers subject to the Public Utilities Act, to the extent that they also are subject to Decision No. 82061, as amended, are directed to establish in their tariffs the increases necessary to conform with the further adjustments ordered by this decision.

3. Tariff publications required to be made by common carriers as a result of this order shall be filed not earlier than the effective date of this order and may be made effective not earlier than the tenth day after the effective date of this order on not less than ten days' notice to the Commission and to the public and such tariff publications shall be made effective not later than July 10, 1976; and the tariff publications which are authorized but not required to be made by common carriers as a result of this order may be made effective not earlier than the tenth day after the effective date of this order, and may be made effective on not less than ten days' notice to the Commission and to the public if filed not later than sixty days after the effective date of the minimum rate tariff pages incorporated in this order.

4. Common carriers, in establishing and maintaining the rates authorized by this order, are authorized to depart from the provisions of Section 461.5 of the Public Utilities Code to the extent necessary to adjust long- and

short-haul departures now maintained under outstanding authorization; such outstanding authorizations are hereby modified only to the extent necessary to comply with this order; and schedules containing the rates published under this authority shall make reference to the prior orders authorizing long- and short-haul departures and to this order.

5. In all other respects, Decision No. 82061, as amended, shall remain in full force and effect.

6. To the extent not granted herein, OSH 238 and Petitions Nos. 240 and 285 in Case No. 5437, Petitions Nos. 4 and 7 in Case No. 9819, and Petitions Nos. 1 and 3 in Case No. 9820 are denied.

7. Overlying carriers subject to Decisions Nos. 80578, 81799, and 82061, as amended, are prohibited from requiring an underlying carrier to use trailers owned or controlled by the overlying carrier as a condition of employment in connection with transportation services performed under rates and charges contained in Minimum Rate Tariffs 7-A, 17-A, and 20.

The effective date of this order shall be twenty days after the date thereof.

Dated at San Francisco, California, this 8th day of June, 1976.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturgeon
Commissioners

I dissent. This adds a needless extra layer of regulation to an already shaky house of cards.

/s/ Leonard Ross
Leonard Ross
Commissioner

I dissent. More senseless rules made to be broken.

/s/ Robert Batinovich
Robert Batinovich
Commissioner

Certified As A True Copy

/s/ William R. Johnson
William R. Johnson
Executive Director
Public Utilities Commission
State of California

1mm
Prop. Rept.

Before the Public Utilities Commission of
the State of California

In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of sand, rock, gravel and related items in bulk, in dump truck equipment between points in California as provided in Minimum Rate Tariff 7-A and the revisions or reissues thereof.	Case No. 5437 Order Setting Hearing 238 (Filed January 16, 1973) Petition for Modification No. 240 (Filed February 9, 1973; amended February 4, 1975) Petition for Modification No. 285 (Filed February 28, 1975; amended May 27, 1975)
In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of rock, sand, gravel and related items in bulk, in dump truck equipment in Southern California as provided in Minimum Rate Tariff 17-A and Southern California Production Area and Delivery Zone Directory 1, and the revisions or reissues thereof.	Case No. 9819 Petition for Modification No. 4 (Filed February 4, 1975) Petition for Modification No. 7 (Filed February 28, 1975; amended May 27, 1975)
In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of rock, sand and gravel in bulk, in dump truck equipment in Northern California as provided in Minimum Rate Tariff 20 and Northern California Production Area and Delivery Zone Directory 2, and the revisions and reissues thereof.	Case No. 9820 Petition for Modification No. 1 (Filed February 4, 1975) Petition for Modification No. 3 (Filed February 28, 1975; amended May 27, 1975)

(Appearances as shown in Appendix A)

PROPOSED REPORT OF EXAMINER
J. W. MALLORY

Order Setting Hearing 238 was issued to receive evidence with respect to proposals of the Commission's Transportation Division concerning revision of Minimum

Rate Tariffs 7-A, 17-A, and 20 (MRTs 7-A, 17-A, and 20) to incorporate therein rules and regulations providing for compensation to carriers which furnish units of equipment consisting of a tractor and driver without trailing equipment for the movement of commodities covered by said tariffs.

Associated Independent Owner-Operators, Inc. (AIOO), a nonprofit corporation with a membership of approximately 1,000 highway permit carriers, seeks in Petition No. 240 (and related proceedings) modification of MRTs 7-A, 17-A, and 20 by incorporating therein rules and regulations providing for the compensation to be paid to overlying carriers who furnish trailing equipment without power units to subhaulers for the movement of commodities covered by said tariffs.

California Dump Truck Owners Association (CDTOA), a nonprofit corporation with a membership of approximately 1,000 highway carriers seeks in Petition 285 (and related proceedings) to amend MRTs 7-A, 17-A, and 20 by incorporating therein rules and regulations providing for the compensation to be paid to dump truck carriers operating a power unit which pulls non-owned dump trailer and/or semitrailer equipment.

OSH 238 and Petition 240 were heard in a consolidated record in February and March 1974, and the matters were removed from the calendar in order to rule on the motion to dismiss the proceedings filed by California Trucking Association (CTA) which opposes the relief sought. Decision No. 83672 dated October 29, 1974 denied the motion to dismiss and ordered that further hearings be held.

The decision stated that the Commission considers that evidence designed to show that the provisions of Item 94 of former MRT 7 (now Item 210 of MRT 7-A) are reasonable and appropriate provisions in connection with other proposals is essential to resolve the issues presented in these proceedings.[1] Parties were placed on notice that the Commission considers the reasonableness of the provisions of Item 210 (Payments to Underlying Carriers) of MRT 7-A and related provisions of MRTs 17-A and 20 is an issue in OSH 238 and Petition 240.

Further hearings in the captioned proceedings were held before Examiner Mallory on December 9, 1974, March 10, 11, and 12, June 2, 3, 4, and 5, and July 14, 1975. The matters were submitted on the latter date. The

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[1]Item 210 (Payments to Underlying Carriers) reads as follows:
"Charges paid by any overlying carrier to an underlying carrier and collected by the latter carrier from the former for the service of said underlying carrier shall be not less than 95 percent of the charges applicable under the minimum rates prescribed in this tariff, less the gross revenue tax applicable and required to be paid by the overlying carrier. (See Notes 1 and 2.) The underlying carrier may extend credit to the overlying carrier for a period not to exceed twenty days following the last day of the calendar month in which the transportation was performed, and payment to the underlying carrier must be made within that time. Freight bills for transportation and accessorial charges shall be presented by underlying carriers to overlying carriers within three days after the last calendar day of the month in which the transportation was performed.
"NOTE 1.—As used in this item the term gross revenue tax means the tax payable to the California Public Utilities Commission under the Transportation Rate Fund Act.
"NOTE 2.—Nothing herein contained shall prevent an overlying carrier, in paying such charges, from deducting therefrom such liquidated amounts as may be due from the underlying carrier to the overlying carrier, providing such deductions have been authorized in writing by the underlying carrier. Any overlying carrier electing to employ this procedure shall itemize such amounts and maintain for the Commission's inspection all documents involved in the transaction."

requests for an Examiner's Proposed Report was approved by the Commission.

At the original series of hearings evidence was presented by representatives of the Commission staff, A100, and CTA. At the hearings subsequent to the issuance of Decision No. 83672, evidence was presented by AIOO, the Commission staff, CDTOA, CTA, Northern and Southern California Overlying Carrier Chapters of CDTOA (Overlying Carrier Chapters-CDTOA), and California Asphalt Plant Association (CAPA). CTA and Overlying Carrier Chapters-CDTOA oppose the rules proposed by the Commission staff, AIOO, and CDTOA. CAPA does not oppose such rules.

Staff Evidence—OSH 238

At the initial hearings evidence was presented by the Commission staff witnesses as follows:

Exhibit 238-7—Cost Study
Exhibit 238-8—Proposed Rules
Exhibit 239-9—List of Carriers

The staff engineer sponsoring Exhibit 238-7 testified that the cost data therein is based on costs in Exhibits 213-46 and 213-65 introduced in OSH 213 in Case No. 5437. Those costs served as a basis for the general revision and reissuance of MRT 7 accomplished by Decision No. 82061 in Case No. 5437 (OSH 213). Exhibits 213-46 and 213-65 were designed to develop the costs of operation of reasonably efficient carriers engaged in the transportation of rock, sand, gravel, earth, and asphaltic concrete in bulk in dump truck equipment owned by such carriers. The cost data in those exhibits did not purport to be applicable to overlying carriers who engage other carriers (subhaul-

ers) to perform the transportation, nor to subhaulers. Nor does such cost data have application to MRT 17-A.

The cost data in Exhibit 238-7 develops an estimate of the total costs at operating ratio 100 (no profit) of providing tractor-and-driver services only in connection with transportation of the aforementioned commodities in dump truck equipment. That exhibit shows that tractor-driver costs range from 82.6 percent to 88.3 percent of the total straight-time operating costs, depending upon the labor agreement used in the development of the cost data, the area in which service is performed, and length of haul.

A staff rate expert presented Exhibit 238-8 which contains proposed rules governing the transportation services performed by a carrier that provides a tractor and driver without trailing equipment. The witness testified that a field study was made in which he interviewed 75 underlying carriers and 28 shippers or shipper associations. This study showed that so-called owner-operators which operate as subhaulers and lease trailing equipment are required to pay amounts ranging from 20 to 35 percent of gross revenue for trailer rental. In some instances the trailer rental charge includes the 5 percent "brokerage" fee provided in Item 210 of MRT 7-A; in other instances it does not. Based on this field study and the cost data in Exhibit 238-7, the witness proposes that the tractor-only subhauler be paid not less than 85 percent of the applicable minimum rate, less the 5 percent brokerage fee.[2]

[2]The staff proposal is as follows:

Charge for Tractor and Driver Without Trailing Equipment

Charges to be paid by debtor to a carrier furnishing a tractor and driver without trailing equipment, but towing trailing equipment furnished by the debtor, consignee, or consignor shall be not less than 85 percent of the otherwise applicable charge. In assessing charges under the tonnage rates contained in Sections 2 and 3 of this tariff, the carrier furnishing the tractor and driver need not assess a charge for the amount of the unladen weight of the trailing equipment when under load, nor assess a charge for the empty return movement. (See Exception.)

Exception—The provisions of this item shall not apply when trailing equipment is furnished by any party other than the debtor, consignee, or consignor of the specific transportation charges involved.

In the reopened proceeding additional evidence was offered by the staff. Exhibit 238-11 contains information concerning the substitution of a 7 percent indirect expense ratio for the 10 percent indirect ratio used in Exhibit 238-7. The staff engineer testified that Exhibit 238-11 was offered to show the manner in which indirect expenses were developed in the OSH 213 proceeding (Exhibit 213-30). Exhibit 238-11 also portrays the results of a special study of 2-axle tractor operators. That study showed a composite indirect expense ratio of 7.95 percent. The 5 percent fee paid by such carriers to overlying carriers was considered as an indirect expense in the determination of the 7.95 percent indirect expense figure. The witness stated that the 7 percent indirect expense ratio used in Exhibit 238-7 was selected by the staff based on such data. The average indirect expense ratio for all carriers (used in Exhibit 213-30) was 10.27 percent.

Exhibit 238-12 was prepared to show the difference between total costs and tractor-driver costs resulting from the use of an indirect expense ratio of 7 percent for the tractor-driver, in place of the 10 percent indirect expense ratio used in Exhibit 238-7. Such change in indirect expenses reduces the portion of total costs allocated to tractor-driver operations. Exhibit 238-12 also shows the effect

of updating the cost data in Exhibit 238-7 to show the effect of wage and fuel cost increases. The effect of adjusting costs for current wages and fuel is to raise the percentage of total costs attributable to the tractor-driver by about 2.8 percent. The composite effect of the two changes is to increase the tractor-driver percentage of total costs by approximately 0.2 to 0.3 percent above that shown in Exhibit 238-7. The staff rate expert stated that no change in his proposal was required because of the revisions in the cost data in Exhibit 238-12, even though the 5 percent brokerage fee is included in indirect expenses in that cost exhibit.

The staff rate witness testified that the proposed tariff rules in Exhibit 238-7 are needed in order to regulate relationships between overlying and underlying carriers. Overlying carriers expressed no need for the rule, but indicated to him that the rule would set a standard under which all overlying carriers would know what others are paying to tractor-driver subhaulers. The staff rate witness testified that his investigation showed that shippers indicated no need for the added regulations proposed by him.

No evidence was offered by staff witnesses concerning the reasonableness of the so-called 95 percent rule in Item 210 of MRT 7-A.

Evidence of AIOO (Petition 240)

AIOO, petitioner in Petition 240, presented evidence through an employee of that association who sponsored a study of the costs of owner-operators of tractors and trucks who pull trailers owned by others and who engage in hauling rock, sand, earth, and other commodities in

bulk. In the scope of his study, the witness reviewed questionnaires completed by members of the association concerning their operating expenses. The witness explained that after his review of the record and questionnaire forms of several dump truck operators, he concluded that the staff cost data set forth in Exhibit 265-5 (Petition 265 in Case No. 5437) were similar to the figures developed by him. Therefore, the witness adopted the staff cost data for the purposes of his study, with the exception of historical equipment costs and vehicle licensing and registration fees. An indirect expense ratio of 7 percent also was used in the AIOO study. The results of these analyses are shown in Table 6 of Exhibit 240-1 as follows:

Associated Independent Owner-Operators, Inc.

Comparison of Total Costs Per Revenue Hour at 100 O.R. for Transportation of Rock and Sand

	5-axle Double Bottom Units	5-axle Transfer Truck and Trailer
Average Cost Per Revenue Hour	$21.352	$21.486
Average Total Cost Power Unit Only	18.658	19.901
Power Unit as Percent of Total Unit	87.38	92.62

Based on the cost data set forth above and other factors the witness proposed that MRTs 7-A, 17-A, and 20 be amended by incorporating rules which would provide that charges paid to debtors to a carrier furnishing a tractor and driver without trailing equipment, but towing trailing equipment furnished by the debtor, consignor, or consignee, shall be not less than 80 percent of the otherwise applicable charge; subject to the provision that if an

overlying carrier furnishes the trailing equipment, the charges paid to the underlying carrier shall be 95 percent of the charge so determined.

The witness explained that under AIOO's proposal the tractor and driver would receive an amount less than is indicated in his cost study. Such proposal is based on the rationale that (a) some costs that the trailer owner may experience cannot be accounted for in a cost study, (b) the Commission assertedly has set a maximum trailer rental of 20 percent in enforcement proceedings involving use of trailers owned by shippers, and (c) setting the trailer rental at this time at anything lower than 20 percent would be disruptive of present practices. The witness testified that it would be logical to set the trailer rental rate at 20 percent at the present time and then reduce it to 15 percent in a future proceeding.

The witness, in response to cross-examination questions, indicated that the 20 percent trailer rental was proposed in consideration of the assertion of overlying carriers that they are now recovering part of their overhead costs from trailer rental fees, and that to disrupt that practice by establishing a lower trailer rental fee may cause loss of business to underlying carriers. This testimony is the only evidence adduced by AIOO concerning the reasonableness of Item 210 of MRT 7-A, as directed in Decision No. 83672.

Evidence of CDTOA (Petition 285)

CDTOA, petitioner in Petition 285, presented evidence in support of that petition through a consultant who formerly was the managing director of the association.

The witness testified that since the early 1950's there has been an increasing amount of power units pulling non-owned dump truck trailers. The witness stated that evidence adduced in a prior proceeding (Petition 112 in Case No. 5432) indicated that there were in excess of 1,000 power units pulling non-owned trailer equipment. The rate relationship between power-unit owners and trailer-unit owners has been a major concern of the membership of CDTOA for a number of years. As a result of that concern, a policy was developed to provide an equitable division of revenues between each faction. The witness stated that it is imperative that the minimum rate tariffs be clarified so that all carriers will be on notice as what the Commission feels is a fair and equitable division of revenues between factions.

The witness for CDTOA supported the proposal of AIOO with minor modifications. The witness explained that the 85-15 percent allocation of costs developed by the staff does not give adequate consideration to the problem of overhead expenses of the overlying carrier. According to the witness, an owner-operator experiences substantially lower indirect expenses than the operator of a fully-owned unit. The study made by the witness in Exhibit 285-3 was directed to that aspect of operating expenses.

Exhibit 285-3 purports to show the indirect expenses of small carriers engaged in the operation of different kinds of dump truck equipment. For the purposes of preparing the data in the exhibit the witness included the 5 percent brokerage fee as an indirect expense. The exhibit developed that the average indirect expense ratio of the 30 so-called "pullers" included in the study was 7.23

percent, as compared with average indirect expense ratios of 11.41 percent of 7 carriers operating bottom dump trucks, and 9.73 percent for 19 carriers operating 3-axle truck equipment. The witness stated that the thrust of his exhibit was to show that indirect expenses are greater for fully-owned units than for tractor-only operators.

The CDTOA witness testified that the so-called 5 percent commission or brokerage fee was established to provide remuneration for the overhead expenses incurred by overlying carrier when they employ subhaulers on the premise or theory that such carriers are in the trucking business and are providing a transportation service. According to the witness, the need to provide remuneration for sales costs is not affected by the fact that the overlying carrier may supply trailers to subhaulers. The witness stated that his proposal differs from the staff or AIOO in that the 5 percent commission or brokerage fee is computed on the full minimum rate rather than on that portion of the rate allocated to the "puller".

California Trucking Association

CTA presented evidence through three witnesses. Two overlying carriers testified in opposition to the establishing of additional rules providing for division of minimum rates between overlying carriers who furnish trailers and the underlying carriers who pull them. The overlying carriers stated, in effect, that the indirect expenses incurred by them on behalf of subhaulers exceeded the 5 percent brokerage fee or commission provided by Item 210 of MRT 7-A, and that their charges for trailer rental covered use of the trailer and also provided for recovery

of that portion of their indirect expenses in excess of the 5 percent brokerage fee.

The assistant director of CTA's division of transportation economics presented CTA's proposals in the consolidated proceedings. The witness proposed in Exhibit 238-14 that Item 210 of MRT 7 and related provisions of other tariffs be deleted, and that General Order No. 130 (Rules Governing the Leasing of Motor Vehicles) be amended to require the filing with the Commission of subhaul agreements which include provision for compensation by one carrier to another for the lease of trailer equipment. According to the witness, the filing of such subhaul agreements would permit the Commission staff and other parties to build up a body of information for use in any subsequent proceeding involving leasing of trailers.

The CTA staff witness testified that the so-called 95 percent rule (Item 210-MRT 7) is the heart of this proceeding in that the 5 percent of the minimum rate allotted to overlying carriers is inadequate to compensate such carriers for the performance of their services on behalf of subhaulers. Therefore, in order to gain the revenues they deem adequate, overlying carriers assertedly increase their revenues through trailer rentals to subhaulers at amounts in excess of the fair rental value of the trailer equipment. It is the position of CTA that any further attempt by the Commission to apportion the minimum rates between overlying carriers and underlying carriers will cause overlying carriers to purchase and operate tractors, or will cause other and different arrangements to be initiated that will defeat the intent of new rules. The CTA staff witness cited to the testimony of the two over-

lying carrier members of that association to support the CTA's contentions concerning the result of any additional tariff rules apportioning minimum rates between overlying and underlying carriers.

Overlying Carrier Chapters of CDTOA

An overlying carrier appearing for the Northern and Southern Overlying Carrier Chapters of CDTOA testified in opposition to the proposals of the staff, AIOO, and CDTOA. In Exhibit 238-15, the witness endeavored to show through analyses of the income statements of six overlying carriers that the present 95-percent rule (Item 210 of MRT 7) provides inadequate compensation to overlying carriers for the functions performed on behalf of subhaulers. The witness described those services as follows:

1. Obtaining work through bidding of jobs. This purportedly involves the surveying of potential construction projects; determining the trucking requirements for the project; preparing the trucking portion of the contractor's bid; and advising the contractor on rates, sources of materials, and other factors.
2. Servicing the contractor, by determining the daily number of vehicles required, placing trucking supervisors at loading and discharge points, and advising contractors concerning the daily work accomplished.
3. Preparation of freight bills for underlying carriers and advising them concerning rates.

4. Supplying capital to contractors and underlying carriers by paying the latter for their services in advance of the receipt of payment from contractors.
5. Furnishing fuel, tires, and repairs to underlying carriers at cost, based on volume discounts or credit arrangements accorded to the overlying carrier by its suppliers.
6. Providing parking for subhaulers' equipment at or near jobsite without cost.
7. Providing liability insurance for trailer-equipment owned by the overlying carrier under limits in excess of that available to subhaulers operating single-units.

The witness testified that his analyses of the cost studies upon which the minimum rates in MRTs 7-A and 17-A are predicated indicate that such cost studies do not make provision for the indirect expenses enumerated above, inasmuch as such cost studies are designed to reflect the costs of a full-unit operator furnishing service direct to a shipper.

In Exhibit 238-15, the witness allocated expenses to the management and overhead functions related to employing subhaulers and to the furnishing trailers to subhaulers. Based on his methods of expense allocations, the witness determined that the 5 percent of the revenue under the minimum rate allocated to the overlying carrier under Item 210 of MRT 7-A did not cover the associated expenses; and that the amounts collected for trailer-rental failed to cover the related costs.

Cross-examination of the witness indicated that for 75 percent of its transportation requirements CAPA members deal directly with individual owner-operators, and that approximately 25 percent of their transportation requirements are fulfilled by overlying carriers. Overlying carriers or "brokers" are used primarily to meet the overflow trucking requirements of CAPA members, and that it is for the convenience of the asphalt shipper that overlying carriers' services are used.

According to the CAPA witness there are approximately 200 asphalt plants in California, of which more than 190 are fixed facilities, and less than 10 are portable plants used for remote construction projects.

The witness testified that transportation from fixed facilities requires less service by overlying carriers than work on construction projects, such as described in the testimony of the witness for Overlying Carrier Chapters-CDTOA. CAPA's witness stated that asphalt producers generally use owner-operators of full units to perform their primary transportation needs, and that overlying carriers usually are called upon only to cover the occasional excess trucking requirements of individual producers. When overlying carriers are used by asphalt plants, the carriers are required only to locate the number of subhaulers required for that day's work. No supervisory employees are placed at origin or destination by the overlying carriers, no rate information is furnished to the shipper, and no job bidding is undertaken. CAPA believes the present brokerage fee of 5 percent is adequate for services performed by overlying carriers for the use made of them by asphalt plants.

Based on his analyses, the witness concluded that adoption of the proposals of the staff, AIOO, or CDTOA would cause either of the following to occur:

1. Overlying carrier would fail to adequately maintain the mechanical condition, tires, and appearances of the trailers provided to subhaulers, resulting in a lessening of the ability of the subhaulers to furnish adequate service; or
2. Overlying carriers may cease to employ tractor-only subhaulers, and may acquire and operate full units.

In the opinion of the witness, tractor-only subhaulers would be worse off under the proposals of the staff, AIOO, or CDTOA than under existing conditions.

Evidence of CAPA

The executive director of CAPA testified that CAPA is a nonprofit association of asphalt producers and contractors organized to advance and protect the interests of that industry. CAPA has participated extensively in proceedings involving the establishment or revision of minimum rates for transportation of asphalt in bulk in dump trucks. The position of CAPA in this proceeding is that the present 5 percent brokerage fee or commission should not be increased because it adequately covers the services performed by overlying carriers for underlying carriers in connection with transportation of asphalt from plant sites of producers to jobsites of contractors who are members of CAPA. CAPA also opposes the elimination of the so-called 95-percent rules, as proposed by CTA.

Discussion—MRT 7-A

The costs underlying the existing minimum rates in MRT 7-A are based on the assumption that services are performed by a carrier owning and furnishing a full unit of equipment.

The record herein indicates that the combined operating costs of a puller (tractor-driver) and an overlying carrier furnishing trailer units for work on construction projects are different from, and may be substantially greater than, the costs for a full-unit operator.

Therefore, there can be no division of a minimum rate bottomed on costs incurred by a full-unit operator which will be equitable to both the puller and the overlying carrier furnishing trailers. To some extent this fact is recognized in the proposals of AIOO and CDTOA, wherein those associations propose that the overlying carrier furnishing trailers receive a larger allocation of the minimum rate (20 percent for trailer rental and 5 percent for brokerage) than is indicated by the cost data of record. The cost data supplied by AIOO in Exhibit 240-1 indicates, for example, that only 12.62 percent of the total operating cost of a full-unit consisting of a tractor and two bottom-dump trailers is attributable to operating the trailers and that the balance (or 87.38 percent) is attributable to the operation of the tractor unit with driver. It can be seen from this that any attempt to allocate minimum rates between pullers and overlying carriers furnishing trailers in the manner proposed by AIOO and CDTOA will be arbitrary and will not be based on operating costs of record.

On the other hand, the staff proposed in Exhibit 238-8 that carriers furnishing tractors and drivers without trailing equipment assess and collect not less than 85 percent of the minimum rate, less the brokerage fee of 5 percent. This proposal is more closely related to the cost data in Exhibits 238-12 and 240-1 than are the proposals of AIOO and CDTOA, yet the staff proposal overlooks the fact that the brokerage fee of 5 percent is included in the indirect costs apportioned to the tractor and driver. The tractor-driver portion of total costs in the staff study ranges from 84.4 percent to 87.8 percent of the full-unit operating costs for straight-time service. If credence is given to the cost data in Exhibit 238-12, the underlying carrier operating as a puller should receive not less than 85 percent of the revenue under the minimum rate without deduction of a brokerage fee.

None of the parties advocating the establishment of rules governing the division of the minimum rate between pullers and overlying carriers supplying trailers have presented studies designed to show that the provisions of Item 210 of MRT 7-A (and related provisions of MRTs 17-A and 20) are reasonable and appropriate in connection with their proposals herein, as directed in Decision No. 83672. The evidence directed specifically to that point is the testimony of CDTOA witness (at page 489 of the transcript), a CTA witness (at page 557 of the transcript), and a witness appearing for Overlying Carrier Chapters-CDTOA (at page 709 of the transcript). The CDTOA witness testified to the effect that it is impossible to analyze the indirect expenses of overlying carriers, although the witness recognized that such in-

direct expenses are substantial. The CTA witness, an overlying carrier, testified that the present 5 percent commission is insufficient to adequately cover the costs of bidding and running dump truck operations on freeway construction projects. The witness appearing for Overlying Carrier Chapters-CDTOA endeavored to show the inadequacy of the existing 5 percent commission by analyzing the expenses of eight overlying carriers.

The evidence of record that bears on the issue of the reasonableness of the existing rule in Item 210 of MRT 7-A shows that the 5 percent of the minimum rate allocated to overlying carriers is inadequate to cover the services performed by overlying carriers for subhaulers with respect to work on construction projects. The record also shows that such inadequacy is compensated for by extracting trailer-rental fees in excess of the fair rental value of such equipment. On the other hand, the cost evidence presented by the staff and AIOO shows that under any reasonable division of the costs which underlie the existing minimum rates, at least 85 percent of the total operating cost should be allocated to the tractor and driver and only 15 percent to the trailers, with no reduction from the 85 percent for compensation for services performed by overlying carriers on behalf of subhaulers.

As heretofore indicated, CTA and the Overlying Carrier Chapters-CDTOA oppose the establishment of any additional regulations in these proceedings, for the principal reason that overlying carriers use trailer rental to recover from tractor-only subhaulers that portion of the overlying carriers' overhead expenses which are not

recovered in the 5 percent brokerage fee allowed under Item 210 of MRT 7-A. It is the position of those protestants that the establishment of a trailer-rental fee at 20 percent of the minimum rate will cause overlying carriers to operate full units owned by them; thus, tractor-only subhaulers will be driven out of business.

It is clear that any attempt by the Commission to establish a division of the minimum rates between tractor-only subhaulers and overlying carriers furnishing trailer equipment will cause serious disruptions in the construction industry. It is also clear that the minimum hourly rates do not reflect the operating costs of subhaulers, either on a full-unit basis or on a tractor-only basis. The foregoing conclusion stems from the fact that the cost data underlying the rates in MRT 7-A are based on the operations of a full-unit by the carrier that actually performs the service and because the reasonableness of a 5 percent brokerage fee deducted from the minimum rate has never been established.

The record indicates that additional tariff rules that would establish a division of revenues between pullers and overlying carriers that furnish trailers on construction projects will either drive the pullers out of business or cause the persons involved to seek some new method to circumvent the added tariff rules. Before pullers are driven out of business, some accommodation will be made which will permit the pullers to continue to operate and the overlying carriers to obtain the revenues they feel are necessary for the risks involved in bidding and operating large construction projects. That accommodation, necessarily, would violate at least the spirit, if

not the content, of the added tariff rules and would cause new and different enforcement problems for our staff.

The only enforceable tariff provision is to require that MRT 7-A rates apply to operations by subhaulers; that no deductions can be made from tariff rates for trailer rental, brokerage fees, nor any other services or facilities furnished by another carrier; and that any recompense for brokerage or similar services be obtained in the form of charges higher than the minimum rates. If the foregoing principles are established to govern transportation services performed under MRT 7-A the level of the minimum rates can be reduced to reflect the lower overall costs of carriers now operating as subhaulers.

Discussion—MRTs 17-A and 20

The transportation of asphaltic concrete and other processed materials from fixed plant locations is subject to zone rates in MRTs 17-A and 20.

The functions of overlying carriers are different with respect to hauling from fixed locations, such as asphalt plants, and hauling on construction projects. The services performed by overlying carriers on construction projects as described by overlying carriers appearing for CTA and Overlying Carrier Chapters-CDTOA are greatly in excess of the services performed by overlying carriers hauling from asphalt plants at fixed locations, as described by CAPA's witness. No evidence was adduced with respect to whether or not the 5 percent brokerage fee or commission is adequate to cover the expenses of overlying on transportation from fixed plant

locations.[3] From the description of the limited activities of overlying carriers hauling from fixed plant locations, it appears that existing 5 percent brokerage fee is adequate to cover the services performed by such overlying carriers. Therefore, the existing minimum rates are sufficient to cover the combined services performed by the overlying carrier and subhauler for transportation subject to the minimum rates in MRTs 17-A and 20. Thus, there is no impediment to establishing a division of rates in those tariffs between tractor-only subhaulers and overlying carriers furnishing trailers. The staff cost study in Exhibit 213-12 and AIOO cost study in Exhibit 240-1 both include the present 5 percent brokerage fee in the indirect expenses of subhaulers considered in those exhibits. In the circumstances, an equitable division of revenues between tractor-only subhaulers and overlying carriers furnishing trailers is 85 percent of the minimum rate revenue to the puller and 15 percent to the overlying carrier. The tariff provisions proposed by the staff, amended to provide that no additional brokerage fee shall be deducted from the puller's portion of the total revenue, will be reasonable and should be adopted for MRTs 17-A and 20.

Discussion—Shipper-Owner Trailers

While the record does not indicate the extent that shippers lease trailers to dump truck carriers, prior enforcement proceedings have found that excessive trailer

[3]It appears that, while the eight overlying carriers whose expenses are analyzed in Exhibit 238-15 engage in all phases of dump truck activities, their primary overlying carrier activities are in connection with construction projects.

rental charges can be a form of unlawful rebate.[4] Those decisions also showed that insufficient cost or similar evidence was made available in the enforcement proceedings to determine whether the trailer rentals imposed by shippers were in excess of the fair rental value of the equipment furnished. That type of evidence is available in this record. Based on the cost data in Exhibits 238-12 and 240-1, the maximum fair rental value of trailing equipment furnished to a dump truck carrier by a shipper is not in excess of 14 percent of the charges under the applicable minimum rate. To prevent unlawful rebates with respect to rental of trailing equipment from shippers to dump truck carriers, MRTs 7-A, 17-A, and 20 should be amended to provide a maximum rental fee of 14 percent of the charges applicable under the minimum rates prescribed in those tariffs for the transportation performed with said trailer equipment. The term "trailer equipment" includes a semitrailer, full-trailer, or any combination thereof which lawfully may be operated in combination with a single power unit.

Recommended Findings of Fact

1. Minimum rates for the transportation of rock, sand, gravel, earth, asphaltic concrete, and related commodities in bulk in dump trucks are set forth in MRTs 7-A, 17-A and 20.

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[4] *McDonald & Dorsa Transportation Co.*, 64 CPUC 340, 344 and 68 CPUC 87; *William H. Marback*, 68 CPUC 290 and cases cited therein; *Wilfred J. Fluery Trucking Co., Inc.*, 68 CPUC 294; *Larry L. Quigley (Quigley Trucking)*, 69 CPUC 486 and cases cited therein; *Summer & Son Transport, Inc., et al.*, 69 CPUC 184; and *F. M. Wert Trucking*, 72 CPUC 167 and cases cited therein.

2. The minimum rates set forth in MRTs 7-A, 17-A and 20 are developed from cost data prepared by and introduced into evidence by the Commission staff.

3. The cost data underlying MRT 7-A was originally introduced into evidence as Exhibits 213-46 and 213-65 in Case No. 5437 (OSH 213). The most recent updating of the cost data in OSH 213 was introduced into evidence in Case No. 5437 (Petition 265) as Exhibit 265-71.

4. The staff cost studies referred to in the preceding finding are based on the operation of a full unit of carrier's equipment by a carrier serving a shipper directly, who neither operates as a subhauler nor as an overlying carrier.

5. A substantial amount of the dump truck services subject to the provisions of MRT 7-A are contracted for by overlying carriers (brokers) who employ subhaulers to perform the transportation services.

6. Item 210 of MRT 7-A (formerly Item 94 of MRT 7) and related items in MRTs 17-A and 20 provide that charges paid by an overlying carrier to an underlying carrier shall not be less than 95 percent of charges applicable under the minimum rates, less liquidated amounts. Under this tariff provision 5 percent of the minimum rate revenue is allocated to the overlying carrier for services performed by it.

7. Item 210 of MRT 7-A and related items in MRTs 17-A and 20 do not contain provisions which set a maximum amount for the rental of trailers furnished to subhaulers by overlying carriers, nor do such tariffs divide the charges under minimum rates between subhaulers fur-

nishing driver and tractor (or truck) and overlying carriers furnishing trailers.

8. In a prior proceeding involving the provisions of Item 94 of MRT 7, the Commission found as follows:

> "2. The existing provisions of Item 94 of MRT 7 were established on data relating to industry practices, some 20 years ago; substantially identical provisions were subsequently incorporated in Item 460 of MRT 17; and the provisions of Item 94 of MRT 7 and Item 460 of MRT 17 *never have been tested by studies which include specific cost data relating to services performed by overlying carriers for underlying carriers.*" (Emphasis supplied.) (Page 18 of mimeo. Decision No. 78965 issued on December 8, 1970 in Petition 112 and Order Setting Hearing in Decision No. 72028 dated February 15, 1967.)

9. Since the establishment of Item 94 of MRT 7, it has become an increasing practice for overlying carriers to employ subhaulers who furnish a tractor (or truck) with driver (puller) and who pull a trailer or set of trailers owned by the overlying carrier. CDTOA estimates that there are in excess of 1,000 pullers holding permits as dump truck carriers.

10. Pullers also lease trailing equipment from shippers. The extent of this practice cannot be determined from the record, but the practice appears to be minimal compared with the operations of pullers for overlying carriers.

11. Order Setting Hearing 238 was issued to receive evidence with respect to proposals of the Commission's Transportation Division concerning revision of MRTs 7-A, 17-A, and 20 to incorporate therein rules and regulations providing for compensation to carriers which furnish units of equipment consisting of a tractor and driver without trailing equipment for the movement of commodities covered by said tariffs. Cost data and other evidence was presented by the Commission staff witnesses to support the staff proposal.

12. AIOO seeks in Petition 240, as amended (and related proceedings), modification of MRTs 7-A, 17-A, and 20 by incorporating therein rules and regulations providing for the compensation to be paid to overlying carriers who furnish trailing equipment without power units to subhaulers for the movement of commodities covered by said tariffs. Cost data and other evidence were presented by AIOO in support of its proposals.

13. OSH 238 and Petition 240 were heard on a consolidated record in February and March 1974, and the matters were removed from the calendar in order to rule on the motion to dismiss the proceedings filed by CTA which opposes the relief sought. Decision No. 83672 dated October 29, 1974 denied the motion to dismiss and ordered that further hearings be held. Decision No. 83672 placed the parties on notice that the Commission considers that the reasonableness of the provisions of Item 210 (Payments to Underlying Carriers) of MRT 7-A and related provisions of MRTs 17-A and 20 is an issue in OSH 238 and Petition 240.

14. CDTOA seeks in Petition 285 (and related proceedings) to amend MRTs 7-A, 17-A, and 20 by incorporating therein rules and regulations providing for the compensation to be paid to underlying carriers operating a power unit which pulls non-owned dump trailer and/or semitrailer equipment. Evidence was presented in support of that proposal.

15. CTA opposes the addition of any rules which prescribe the division of minimum rate revenues between overlying carriers furnishing trailers and pullers. As an alternative to the proposals of the staff, CDTOA, and AIOO, CTA proposes that Item 210 of MRT 7-A (and related provisions of MRTs 17-A and 20) be cancelled, and General Order No. 130 (Rules Governing Leasing of Motor Vehicles by Highway Permit Carriers) be amended to require the filing of leases or rental agreements for use of trailing equipment furnished by an overlying carrier to an underlying carrier. Evidence was offered in support of CTA's proposals.

16. Overlying Carrier Chapters-CDTOA also oppose the additional rules proposed by the staff, AIOO, and CDTOA. Evidence in support of its position was offered by protestant.

17. CAPA, appearing as an interested party, opposes any increase in the so-called brokerage fee (the 5 percent of the minimum rate allotted to the overlying carrier under provisions of Item 210 of MRT 7-A and related provisions of MRTs 17-A and 20). CAPA has no objection to the establishment of tariff provisions dividing the charges under minimum rates in MRTs 7-A, 17-A, and 20 between pullers and overlying carriers or shippers that furnish trailer equipment. Evidence in support of its position was presented by CAPA.

18. The record indicates that under current practices overlying carriers assess trailer rental charges ranging from 15 to 30 percent (exclusive of the 5 percent brokerage fee) and that the most frequently assessed trailer rental fees are 20 or 25 percent. The record does not contain information concerning the trailer rental charges currently imposed by shippers.

19. The staff, AIOO, and CDTOA allege that provisions establishing a division of minimum rate revenues between pullers and overlying carriers furnishing trailers are urgently needed to protect pullers. None of those parties urge that any particular level of trailer rental fees now assessed is unreasonable or discriminatory.

20. Revenues under the minimum rates in MRTs 7-A, 17-A, and 20 are proposed to be divided as follows:

Commission Staff:

Tractor (Truck) and Driver—85 percent
(less 5 percent of 85 percent for brokerage fee)
Trailer Owner—15 percent
(plus 5 percent of 85 percent if an overlying carrier)

AIOO:

Tractor (Truck) and Driver—80 percent
(less 5 percent of 80 percent for brokerage fee)
Trailer Owner—20 percent
(plus 5 percent of 80 percent as brokerage fee if an overlying carrier)

CDTOA:

Tractor (Truck) and Driver—80 percent
(less 5 percent of 100 percent as brokerage fee)
Trailer Owner—20 percent
(plus 5 percent of 100 percent if an overlying carrier)

21. The cost data presented by the staff divides the total operating costs for a full unit (at 100 operating ratio) between the tractor (truck) and driver and the trailer(s). The cost data is based on exhibits previously introduced by the staff in Exhibits 213-46, 213-65, and 265-71, except that the indirect expense ratio is reduced to 7 percent and the present 5 percent brokerage fee is included in tractor-driver costs as a portion of indirect expenses. Representative of the division of costs developed in Exhibit 238-12 are the following:

Five-Axle Bottom Dump Unit	
Hourly Costs (straight time)	
Total Cost — Full Unit	$21.982
Total Cost — Power Only	$19.048
Power Unit as % of Total Unit	86.7
Distance Costs	
5 Miles	
Total Cost — Full Unit	$ 0.565
Total Cost — Power Only	$ 0.496
Power Unit as % of Total Unit	87.8
50 Miles	
Total Cost — Full Unit	$ 2.805
Total Cost — Power Only	$ 2.397
Power Unit as % of Total Unit	85.5

22. Cost data presented by AIOO divides total operating costs for a full unit in a manner similar to the staff data. AIOO's cost study also uses a 7 percent indirect

expense ratio and includes the 5 percent brokerage fee as a portion of indirect expenses. The cost data developed in Table 6 of Exhibit 240-1 is as follows:

	5-Axle Double Bottom Unit	5-Axle Truck and Transfer Trailer
Average Cost per Revenue Hour at 100 O.R.	$21.352	$21.486
Average Total Cost Power Unit Only	$18.658	$19.901
Power Unit as % of Total Unit	87.38	92.62

23. Cost data presented by CDTOA was designed to show that pullers experience lower indirect expenses than operators of full units; for example, Exhibit 285-3 shows that in 1974 the average indirect expense ratio for pullers was 7.23 percent, compared to 11.41 percent for tractor- and bottom-dump trains operated as a full unit.

24. Based solely on the cost data in Exhibits 238-12 and 240-1, the reasonable division of the revenue under minimum rates in MRT 7-A for the operation of a power unit and driver would be 86 percent, and for the trailer(s) would be 14 percent, with no provision for a brokerage fee.

25. Evidence was presented on behalf of CTA and Overlying Carrier Chapters-CDTOA to show that overlying carriers engaged in work on construction projects consider that the 5 percent of minimum rate revenues alloted to them under provisions of Item 210 of MRT 7-A are insufficient to cover the services performed by them on behalf of the contractor and the subhaulers employed on such construction projects. This assumption was confirmed by the analysis of the operating statements of

eight overlying carriers in Exhibit 238-15, presented by Overlying Carrier Chapters-CDTOA, and in the testimony presented on behalf of that organization.

26. Overlying carriers appearing for CTA testified that trailer rental fees are used by them to recoup the additional revenues which they believe are necessary to cover their expenses as overlying carriers which are in excess of the amounts provided by the present 5 percent brokerage fee. The testimony shows that the trailer rental fees assessed are greater than necessary to recover the reasonable expenses associated with the furnishing of trailing equipment to pullers.

27. The proposal of AIOO that trailer-rental be based on a maximum of 20 percent of the revenue accruing under the minimum rates was made in recognition that overlying carriers experience expenses which are not fully compensated for under the present 5 percent brokerage fee; therefore, the difference between 20 percent and the 12.2 to 14.5 percent of total cost allocated to trailing equipment in AIOO's Exhibit 240-1 represents that witness's judgment as to the amount of additional revenue which should be accorded to the overlying carrier for services not compensated for under the present 5 percent brokerage fee.

28. In the establishment of minimum rates pursuant to Section 3662 it has been the policy and procedure of the Commission to determine the cost of performing transportation in a reasonably efficient manner by the type of carrier best suited to provide the service, and then to determine those rates which will return that cost plus a reasonable profit. In the case of transportation of

rock, sand, gravel, and earth on construction projects, the Commission determined that the reasonably efficient carrier was one that furnished a full unit of equipment and did not operate either as an overlying carrier or as a subhauler.

29. The record shows through the testimony of AIOO, CTA, and Overlying Carrier Chapters-CDTOA that the existing provisions of Item 210 of MRT 7-A are unreasonable in that the division of the charges under minimum rates in MRT 7-A fails to adequately compensate overlying carriers for the services performed on construction projects.

30. The data set forth in Exhibits 238-12 and 240-1 show that pullers who operate as subhaulers for overlying carriers that furnish trailers are inadequately compensated for their services to the extent that such pullers receive less than 86 percent of the charges under the minimum rate.

31. The cost data and other evidence adduced herein show that the combined operations of an overlying carrier and a tractor-only subhauler for transportation of rock, sand, gravel, and earth on construction projects produce total costs in excess of the costs which underlie the present rates in MRT 7-A; therefore, no division of the present MRT 7-A minimum rates between a tractor-only subhauler and an overlying carrier can be equitable to both.

32. Further division of the minimum rates in MRT 7-A between pullers and overlying carriers as proposed in OSH 238 and Petitions 240 and 285 will not result in just and reasonable minimum rates.

33. The minimum rates set forth in MRTs 17-A and 20, which are applicable from fixed plant locations, are sufficient to cover the combined operating expenses of tractor-only subhaulers and overlying carriers furnishing trailers.

34. MRTs 17-A and 20 should be amended to provide a division of revenue under the minimum rates set forth therein between tractor-only subhaulers and overlying carriers furnishing trailers. The reasonable division of revenues, based on cost data set forth in Exhibits 238-12 and 240-1, is 85 percent to the tractor-only subhauler and 15 percent to the overlying carrier supplying trailers, with no provision for assessment of additional brokerage fees. Commission staff proposals amended to provide for such division of revenues will result in just, reasonable, and non-discriminatory tariff rules and should be incorporated in MRTs 17-A and 20.

35. In prior enforcement proceedings the Commission has found that trailer rentals paid by highway permit carriers to shippers in excess of the fair rental value of the equipment furnished (expressed as a percentage of revenue under the minimum rates applicable to the transportation services in which the trailers are used) is an unlawful rebate in violation of the Highway Carriers Act. Rules should be established in MRTs 7-A, 17-A and 20 prohibiting the payment of excessive trailer rentals to shipper in order to prevent unlawful rebates. Based on the data in Exhibits 238-12 and 240-1, trailer rental paid to a shipper which is greater than 14 percent of the revenues accruing under the minimum rate applicable to the transportation in which such trailers are used is excessive and should be prohibited.

36. The proposal of CTA that Item 210 of MRT 7-A (and related items in MRTs 17-A and 20) be cancelled is beyond the announced scope of the consolidated proceedings, and full-unit subhaulers were not properly notified that a proposal affecting their operations would be considered in the consolidated proceeding.

Recommended Conclusions of Law

1. MRTs 7-A, 17-A, and 20 should be amended to incorporate therein the tariff provisions found reasonable in the above findings.

2. To the extent not adopted in preceding findings, the proposals of the staff in OSH 238 and of petitioners in Petitions 240 and 285 in Case No. 5438 (and related petitions) should be denied.

3. Adequate notice that the Commission would consider the proposals of CTA was not afforded all respondents; therefore, such proposals may not be considered herein.

4. Further proceedings should be instituted to determine the method under which adequate total compensation can be achieved for the combined operations of overlying carriers furnishing trailing equipment and subhaulers operating as pullers, under the provisions of MRT 7-A.

Dated at San Francisco, California, this 13th day of November, 1975.

/s/ J. W. MALLORY
J. W. Mallory
Examiner

Appendix A

LIST OF APPEARANCES

Petitioner (Petition 240): *G. Ralph Grago, James R. Foote,* and *John C. Grissom,* for Associated Independent Owner-Operators, Inc.

Petitioner (Petition 285): *E. O. Blackman* and *C. Ralph Eighmy,* for California Dump Truck Owners Association.

Respondents: *Ray S. Bruton* and *Mike Mallin,* for Miles & Sons Trucking Service; *Robert K. Davidson,* for Roy E. Lay Trucking; *Don L. Hays,* for A. W. Hays Trucking; *La Fay Lindeman,* for Lindeman Bros. Inc.; *Kenneth P. Harrison,* for Harrison-Nichols Co. Ltd.; *Walker Brown,* for Walker Brown Trucking, Inc.; *N. Vannucci,* for CBM Trucking Co.; *Albert Giorgi,* for Giorgi Trucking Co.; *Jack Wood,* for Edgewood Materials; *Les Calkins,* for Les Calkins Trucking Co.; *E. Lockridge,* for Pacific Construction Trucking, Inc.; *William R. Della-Rosa,* for Della-Rosa Bros. Trucking, Inc.; *F. R. Golzen,* for Universal Transport System; *Stanley A. Ziganti,* for CAP Transport, Inc.; *Richard M. Davilla,* for Davilla Trucking, Inc.; *Don R. Moe,* for Southern California Eagle Company; and *J. S. Shafer, Jr.,* for Trucking by J. S. Shafer, Jr.

Protestant: *Richard W. Smith* and *William T. Meinhold,* Attorneys at Law, *R. C. Broberg,* and H. Hughes, for California Trucking Association.

Interested Parties: *Steve Wilcox,* for Kaiser Sand and Gravel; *Harry C. Phelan,* for California Asphalt Pavement Association; *Richard Cunha* and *R. A. Lubich,*

for themselves; Graham & James, by *David J. Marchant,* Attorney at Law, and James Quintrall, for Overlying Carrier Chapters of the California Dump Truck Owners Association; and *E. J. Bertana,* for Lone Star Industries, Inc.

Commission Staff: *Walter H. Kessenick,* Attorney at Law, *E. Q. Carmody* and *J. M. Jenkins.*

Appendix D

Decision No. 85919

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of rock, sand, gravel and related items in bulk, in dump truck equipment in Southern California as provided in Minimum Rate Tariff 17-A and Southern California Production Area and Delivery Zone Directory 1, and the revisions or reissues thereof.	Case No. 9819 Petition for Modification No. 4 (Filed February 4, 1975) Petition for Modification No. 7 (Filed February 28, 1975)

OPINION AND ORDER

Minimum Rate Tariff 17-A (MRT 17-A) names minimum rates for the transportation of rock, sand, gravel, and related commodities by highway carriers in dump truck equipment.

Decision No. 85918 issued today in the captioned proceedings and in Case No. 5437 (OSH 238) et al. found that the provisions in MRTs 7-A, 17-A, and 20 should be revised to provide divisions of revenues between overlying and underlying carriers when trailers are furnished by the former, and that MRT 17-A should be amended by separate order.

It Is Ordered that:

1. Minimum Rate Tariff 17-A (Appendix C to Decision No. 80578, as amended) is further amended by incorporating therein, to become effective July 10, 1976, the tariff pages included in Appendix A, attached hereto and by this reference made a part hereof.

2. Common carriers subject to the Public Utilities Act, to the extent that they also are subject to Decision No. 80578, as amended, are directed to establish in their tariffs the amendments necessary to conform with the further adjustments ordered by this decision.

3. Tariff publications required to be made by common carriers as a result of this order shall be filed not earlier than the effective date of this order and may be made effective not earlier than the tenth day after the effective date of this order on not less than ten days' notice to the Commission and to the public and shall be made effective not later than July 10, 1976.

4. Common carriers, in establishing and maintaining the rule authorized by this order, are authorized to depart from the provisions of Section 461.5 of the Public Utilities Code to the extent necessary to adjust long- and short-haul departures now maintained under outstanding authorizations; such outstanding authorizations are hereby modified only to the extent necessary to comply with this order; and schedules containing the rule published under this authority shall make reference to the prior orders authorizing long- and short-haul departures and to this order.

5. In all other respects, Decision No. 80578, as amended, shall remain in full force and effect.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 8th day of June, 1976.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturgeon
Commissioners

I dissent.
/s/ LEONARD ROSS
Commissioner

I dissent.
/s/ ROBERT BATINOVICH
Commissioner

Certified As A True Copy
/s/ William R. Johnson
Executive Director
Public Utilities Commission
State of California

Appendix E

Decision No. 85920

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation for the purpose of considering and determining minimum rates for transportation of rock, sand and gravel in bulk, in dump truck equipment in Northern California as provided in Minimum Rate Tariff 20 and Northern California Production Area and Delivery Zone Directory 2, and the revisions and reissues thereof.	Case No. 9820 Petition for Modification No. 1 (Filed February 4, 1975) Petition for Modification No. 3 (Filed February 28, 1975)

OPINION AND ORDER

Minimum Rate Tariff 20 (MRT 20) names minimum rates for the transportation of rock, sand, gravel and related commodities by highway carriers in dump truck equipment.

Decision No. 85918 issued today in the captioned proceedings and in Case No. 5437 (OSH 238) et al. found that the provisions of MRT 7-A, MRT 17-A, and MRT 20 should be revised to provide divisions of revenues between overlying and underlying carriers when trailers are furnished by the former, and that MRT 20 should be amended by separate order.

It Is Ordered that:

1. Minimum Rate Tariff 20 (Appendix A to Decision No. 81799) is further amended by incorporating therein, to become effective July 10, 1976 the tariff pages included in Appendix A, attached hereto and by this reference made a part hereof.

2. Common carriers subject to the Public Utilities Act, to the extent that they also are subject to Decision No. 81799, as amended, are directed to establish in their tariffs the amendments necessary to conform with the further adjustments ordered by this decision.

3. Tariff publications required to be made by common carriers as a result of this order shall be filed not earlier than the effective date of this order and may be made effective not earlier than the tenth day after the effective date of this order on not less than ten days' notice to the Commission and to the public and shall be made effective not later than July 10, 1976.

4. Common carriers, in establishing and maintaining the rule authorized by this order, are authorized to depart from the provisions of Section 461.5 of the Public Utilities Code to the extent necessary to adjust long- and short-haul departures now maintained under outstanding authorizations; such outstanding authorizations are hereby modified only to the extent necessary to comply with this order; and schedules containing the rule published under this authority shall make reference to the prior orders authorizing long- and short-haul departures and to this order.

5. In all other respects, Decision No. 81799, as amended, shall remain in full force and effect.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 8th day of June, 1976.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturgeon
Commissioners

I dissent.
/s/ LEONARD ROSS
Commissioner

I dissent.
/s/ ROBERT BATINOVICH
Commissioner

Certified As A True Copy
/s/ William R. Johnson
Executive Director
Public Utilities Commission
State of California

Appendix F

In the Supreme Court of the
State of California

SF 23531

Southern & Northern Overlying Carrier Chapters of the California Dump Truck Owners Association,
Appellants,

vs.

Public Utilities Commission of the State of California,
Appellees.

[Filed Feb. 7, 1977]

NOTICE OF APPEAL TO THE SUPREME COURT OF UNITED STATES

Notice is hereby given that the Southern and Northern Overlying Carrier Chapters of the California Dump Truck Owners Association, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California denying a writ of review, entered in this proceeding on January 5, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated: February 7, 1977.

Graham & James
Boris H. Lakusta
David J. Marchant
By /s/ Boris H. Lakusta
Boris H. Lakusta

CERTIFICATE OF SERVICE

I, Boris H. Lakusta, a member of the Bar of the Supreme Court of the United States and counsel of record for Southern and Northern Overlying Carrier Chapters of the California Dump Truck Owners Association, appellants herein, hereby certify that on February 7, 1977, pursuant to Rule 33, Rules of the Supreme Court, I served a copy of the attached Notice of Appeal by placing said copy in an envelope addressed to the person shown on the attached pages to this Certificate. The envelope was then sealed, postage fully prepaid thereon, and thereafter was deposited in the United States mail on February 7, 1977, at San Francisco, California.

All parties required to be served have been served.

Dated: February 7, 1977.

/s/ Boris H. Lakusta
Boris H. Lakusta
Graham & James
One Maritime Plaza
San Francisco, California 94111

Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS OF THE CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

JANICE E. KERR,
HECTOR ANNINOS,
JAMES S. ROOD,
5066 State Building,
San Francisco, California 94102.
Attorneys for Appellee Public Utilities Commission of the State of California.

Dated: August 31, 1977

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS
OF THE CALIFORNIA DUMP TRUCK
OWNERS ASSOCIATION,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

Appellee, the Public Utilities Commission of the State of California, hereinafter referred to as Commission, pursuant to Supreme Court Rule 16, respectfully moves that the Court dismiss the appeal of the Southern & Northern Overlying Carrier Chapters of the California Dump Truck Owners Association, for the reason that the Commission has reopened the proceedings in the complained-of decision and the

appeal is, therefore, not of a final judgment and is premature.

STATEMENT OF FACTS

On June 8, 1976, the Commission issued Decisions Nos. 85918, 85919, and 85920, which established in Minimum Rate Tariffs 7-A, 17-A, and 20 rules governing the division of revenues between overlying carriers and underlying carriers when trailers are furnished by the overlying carrier to the underlying carrier. These decisions are the subject of the present appeal.

On September 1, 1976, the Commission issued Decision No. 87362, which suspended until further order the orders in Decisions Nos. 85918, 85919, and 85920. The reason for the suspension and amendments was to allow Southern and Northern Overlying Carrier Chapters of the California Dump Truck Association, appellants herein, time to seek review of the Commission Decisions Nos. 85918, 85919, and 85920 in the California Supreme Court.

On January 5, 1977, the California Supreme Court denied the petition for writ of review of Appellant. On January 21, 1977, Appellant filed with the California Supreme Court a petition for rehearing and stay of the effective date of the Court's order. On February 4, 1977, the Court denied this petition.

On January 24, 1977, petitioner filed with the Commission a petition for a further suspension order which has not been acted upon. The orders in Decisions Nos. 85918, 85919, and 85920 remain suspended.

On June 14, 1977, following its filing of the Jurisdictional Statement with this Court, Appellant filed with the Commission a Petition to Set Aside Submission and to Reopen Proceedings in Decisions Nos. 85918, 85919, and 85920. The petition states that Appellant has changed its position with respect to the Commission's establishment of a division of revenues between underlying and overlying carriers and that Appellant would accept a division of revenues on all transportation performed pursuant to the Minimum Rate Tariffs 7-A, 17-A, and 20, provided that the division of revenues allocate 25% of the minimum rate to the overlying carrier and 75% to the underlying carrier.

On June 5, 1977 the three cases were reopened by the Commission. Hearings were held on July 19, 1977 and further hearings have been scheduled for September 7 and 8, 1977.

ARGUMENT

I.

THE APPEAL IS PREMATURE BECAUSE NOT OF A FINAL JUDGMENT

The Commission decisions which are the subject of this appeal have been stayed pending appeal to the California Supreme Court and now to this Court. Further, since the present appeal was filed, the Commission has reopened the cases at the request of Appellant and is in the process of rehearing those aspects

of its decisions of which Appellant complains in its Jurisdictional Statement.

Appellee, therefore, submits that the complained-of decisions are not "final" within the meaning of Title 28, Section 1257 of the United States Code, under which Appellants bring this action. This Court has consistently refused to accept jurisdiction of cases in which the administrative procedure has not been completed. The rationale given has been that the Courts ought not to interfere with the state or federal legislative function until the procedure has been completed and that all administrative remedies should be exhausted before resort to the federal courts. *United States v. Fletcher,* 147 U.S. 664, 37 L.Ed. 322, 13 S.Ct. 434 (1898); *Degge v. Hitchcock,* 229 U.S. 162, 57 L.Ed. 1135, 33 S.Ct. 639 (1912). In *Boston & Maine R. Co. v. United States,* 358 U.S. 68, 3 L.Ed. 2d 34, 79 S.Ct. 107 (1959), this Court dismissed as premature an appeal from a three judge District Court decision remanding a controversy to the Interstate Commerce Commission for determination of the question of that Commission's jurisdiction where the Commission had indicated its readiness to consider the question. Appellee submits that the Court should apply this same rationale to the present case. The Commission has not only expressed its readiness to reconsider the questions presented; it is actively doing so, and at the request of the Appellant.

II.

APPELLANT HAS FAILED TO SHOW ANY INJURY IN ITS COMPLAINT REGARDING EXCLUSION OF PUBLIC WORKS CONTRACTS

Appellant first argues that the Commission erred in providing for the division of revenues between underlying and overlying carriers. It then complains of the Commission's exclusion of public works projects from the decision. Appellee submits that such arguments are not only inconsistent, but that Appellant has failed to show any economic or other injury resulting from such exclusion and, therefore, lacks standing to raise this issue. In *Donaldson v. Read Magazine, Inc.,* 33 U.S. 178, 92 L.Ed. 628, 68 S.Ct. 591 (1947) this Court found that the modification of a complained-of order, limiting the number of persons to whom it applied, in effect granted relief from the provisions of the order and did not constitute an injury sufficient to confer standing.

CONCLUSION

For the above reasons, Appellee respectfully requests that the appeal be dismissed.

Respectfully submitted,

JANICE E. KERR,

HECTOR ANNINOS,

JAMES S. ROOD,

Attorneys for Appellee Public Utilities Commission of the State of California.

Dated: August 31, 1977

Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS OF THE CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Appellants,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DEFER ACTION AND REPLY TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS
OF THE CALIFORNIA DUMP TRUCK
OWNERS ASSOCIATION,
Appellants,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DEFER ACTION AND REPLY TO MOTION TO DISMISS

On June 14, 1977, Appellants filed with the Public Utilities Commission a petition to hold further hearings with a view to modifying the three decisions setting a division of revenues between overlying and underlying carriers. A Commission Administrative Law Judge granted the petition and set hearings pursuant to Section

1708 of the Public Utilities Code.* This action evidently motivated the Commission to file its Motion to Dismiss this appeal. The Motion is at best premature and should be denied.

Nevertheless, the Commission's apparent willingness to reconsider its three challenged decisions in a separate proceeding is reason for this Court to defer taking action in this matter until the Commission has had an opportunity to issue a new decision.

I.

THE FINALITY OF THE CALIFORNIA SUPREME COURT'S ACTION WAS NOT AFFECTED BY APPELLEE'S RECENT DECISION TO HOLD FURTHER HEARINGS

Appellee is mistaken in its assertion that its decision to hold further hearings on setting a division of revenues has affected the finality of the decree of the California Supreme Court denying a writ of review, which is the judgment appealed in this case. The denial of the writ, and the subsequent denial of rehearing, was "the final word of a final court." *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770 (1945).

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*Public Utilities Code §1708: "The Commission may at any time upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

II.

THE FINALITY OF THE APPELLEE'S DECISIONS WAS NOT CHANGED BY ITS DETERMINATION TO HOLD FURTHER HEARINGS

The decisions appealed from remain final until such time as the Commission, after providing the parties an opportunity to be heard, rescinds, alters or amends them. P.U. Code §1708; *Northern Cal. Ass'n v. Public Utilities Commission,* 61 Cal.2d 126, 37 Cal.Rptr. 432, 390 P.2d 200 (1964).

If the Commission were correct that this Court has no jurisdiction to review the three orders in question because the Commission may rescind, alter or amend them pursuant to Section 1708 of the Public Utilities Code, it is difficult to see how this Court would ever have jurisdiction because the Commission may "at any time" rescind, alter or amend its orders. This Court has on many occasions heard appeals from orders of the California Commission.

III.

THIS COURT SHOULD DEFER ACTION UNTIL THE PUBLIC UTILITIES COMMISSION HAS ISSUED A NEW DECISION

The cases cited by Appellee in Part I of its Motion to Dismiss stand for the proposition that this Court will not decide cases unless the disputed issues are plainly presented for resolution and such resolution is necessary. When this appeal was filed, these two requirements were met. Now, however, the granting of Appellants' petition for further hearings *may* make it unnecessary for this Court to decide the case.

The Court should not dismiss the appeal as premature, as it did in *Boston & Maine R. Co. v. United States,* 358 U.S. 68, 3 L.Ed.2d 34, 79 S.Ct. 107 (1959), but should merely postpone making a decision on jurisdiction until after the Commission has acted. In *Boston & Maine,* the District Court set aside the order of the Interstate Commerce Commission and remanded the case for further consideration. In the present case there has been no remand and the Commission's three orders are still valid and could be put into effect. If a new decision from the Commission merely reaffirms the three earlier decisions, it would be unfair to require Appellants to start the long and expensive appeals process all over again.

IV.

IF THIS COURT DENIES THE MOTION TO DEFER ACTION THE DECISIONS OF THE PUBLIC UTILITIES COMMISSION SHOULD BE VACATED

By bringing this appeal Appellants seek to have the three decisions of the Public Utilities Commission vacated and additional hearings held so that Appellants may be afforded procedural due process. By setting further hearings, the Commission will now have an opportunity to reach an equitable decision based on the evidence.

The validity of the three decisions in question nevertheless remains in dispute. The Commission has not conceded that Appellants were denied procedural due process, although in its Motion to Dismiss it does not even attempt to justify the decisions, and the Commission could, if it wanted, put those decisions into effect.

In order that Appellants may be protected from the adverse economic impact of having an inequitable division of revenues put into effect, Appellants pray that this Court, if it declines to defer action, take jurisdiction of the appeal and order that the three decisions of the California Public Utilities Commission be vacated.

V.

APPELLANTS HAVE STANDING TO QUESTION THE CONSTITUTIONALITY OF THE DISTINCTION BETWEEN PUBLIC AND NONPUBLIC WORKS CONSTRUCTION

Appellee misunderstands the force of Appellants' argument concerning the distinction between public and nonpublic works construction projects. Far from asserting that public works construction projects should have been included in the 80%-20% division of revenues, Appellants urge that the Commission's finding, that no division is equitable with respect to public works construction, should have applied equally to nonpublic works construction because no rational distinction, or at any rate no distinction supported by evidence in the record, can be drawn between the two types of projects. Members of the Overlying Carrier Chapters are engaged in transportation on nonpublic works construction projects and would be economically hurt by the Commission's failure to exempt such transportation from the division of revenues if such decisions were to go into effect. Appellants, therefore, have standing.

VI.

CONCLUSION

For the reasons stated above, Appellants pray that this Court postpone a decision on whether or not to take jurisdiction of this appeal until the Commission issues a new decision because only then can it be determined whether the Commission's action will or will not make this appeal moot.

Alternatively, the Court should order that the three orders of the Public Utilities Commission complained of be vacated and that Appellants be awarded all taxable costs of suit pursuant to Rule 57 of the Rules of the Supreme Court.

Respectfully submitted,

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